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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LIMA MEMORIAL HOSPITAL AND GREGORY TURNER,
Petitioners,

v.

WILLIAM L. MANION, M.D.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit's holding, that the Health Care Quality Improvement Act, 42 U.S.C. § 11101 *et seq.*, grants to hospitals and physician peer reviewers merely immunity from damages and not from suit, conflicts with both this Court's characterization of HCQIA immunity in *Summit Health, Ltd. v. Pinhas*, 111 S.Ct. 1842 (1991), and with Congressional intent.

   (a) Whether the Sixth Circuit's holding thwarts Congressional intent to provide incentive and protection to peer reviewers, by forcing most physician suits to trial, thereby increasing health care costs, impeding health care reform, and decreasing the quality of health care by discouraging volunteer physician participation in peer review.

   (b) Whether a district court's denial of a motion to dismiss or a motion for summary judgment based on HCQIA immunity is immediately appealable under the collateral order doctrine.

2. Whether the Sixth Circuit's decision, which will in essence allow a physician subject to peer review under HCQIA to force a trial to attack the subjective motives of the hospital that initiated peer review, conflicts with the Ninth Circuit's determination in *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992), that HCQIA mandates that an objective, not a subjective standard be used, as a matter of law, to assess professional review actions under the presumption of the HCQIA.

PARTIES TO THE PROCEEDING

The parties before the Court of Appeals were Lima Memorial Hospital and Gregory W. Turner, in his capacity as former President and Chief Executive Officer of Lima Memorial Hospital; and William Manion, M.D. Dr. Manion's action in the Federal District Court for the Northern District of Ohio was consolidated with his action previously brought against two other defendants, George Evans, M.D. and Shobha Pai, M.D., who were not parties before the Court of Appeals and are not parties to this Petition. Amicus Curiae briefs were submitted to the Court of Appeals in support of Lima Memorial Hospital by the American Hospital Association and the Ohio Hospital Association. Other Amicus Curiae briefs were submitted to the Court of Appeals by the Semmelweis Society in support of Dr. Manion and a neutral position by the Ohio, California and American Medical Associations.

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PETITION FOR A WRIT OF CERTIORARI

Lima Memorial Hospital petitions the Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 986 F.2d 1036 (6th Cir. 1993). It is set forth in Appendix A at 1a *et seq.* On April 13, 1992, the Court of Appeals entered an Order declining to rule on Dr. Manion's Motion to Dismiss the Hospital's Notice of Appeal, and directing the parties to address the issues raised in the Motion to Dismiss in their briefs on the merits. (Appendix B at 13a) The district court's unreported decision from which the Notice of Appeal was

filed was rendered on March 11, 1992 (Appendix C at 15a) upon reconsideration of its prior unreported decision rendered July 8, 1991. (Appendix D at 20a)

JURISDICTION

The Court of Appeals rendered its opinion on February 26, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (review by writ of certiorari of cases of the courts of appeals).

STATUTES INVOLVED

The Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 provides:

> The Congress finds the following:
>
> (1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.
>
> (2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.
>
> (3) This nationwide problem can be remedied through effective professional peer review.
>
> (4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective peer review.
>
> (5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

Section 11111(a)(1) provides:

If a professional review action (as defined in section 11151(9) of this title) of a professional review body meets all the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section—

(A) the professional review body,

(B) any person acting as a member or staff to the body,

(C) any person under a contract or other formal agreement with the body, and

(D) any person who participates with or assists the body with respect to the action,

shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action. The preceding sentence shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. and the Civil Rights Acts, 42 U.S.C. 1981, et seq. Nothing in this paragraph shall prevent the United States or any Attorney General of a State from bringing an action, including an action under section 4C of the Clayton Act, 15 U.S.C. 15C [15 U.S.C.A. § 15c], where such an action is otherwise authorized.

Section 11112(a) provides:

For purposes of the protection set forth in Section 11111(a) of this title, a professional review action must be taken—

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after

such other procedures are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in Section 11111(a) of this title, unless the presumption is rebutted by a preponderance of the evidence.

STATEMENT OF THE CASE

The Respondent William L. Manion, M.D. ("Dr. Manion") filed a complaint against Petitioners Lima Memorial Hospital ("the hospital") a nonprofit community hospital, and Gregory W. Turner on July 27, 1990.[1] Dr. Manion sought $10,000,000 in damages against *each* defendant for *each* of sixteen counts, plus $10,000,000 in punitive damages.

Dr. Manion's complaint alleged violations of the federal antitrust laws, as well as a variety of state law claims arising out of a peer review process commenced by the hospital, after Dr. Manion misdiagnosed two cases of benign tissue as cancerous. Before the hospital's Board of Trustees took final action, Dr. Manion received a full peer review hearing before an impartial hearing panel of physicians he helped select. Subsequent to the hearing, certain conditions were imposed by the hospital board on his continued privileges to practice pathology. The hospital determined not to extend another contract to him to serve as Pathology Department Chairman or to

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[1] Because Mr. Turner was Chief Executive Officer of the Hospital at the time of the actions in question, and because undersigned counsel represent Mr. Turner only in his capacity as President and Chief Executive Officer of Lima Memorial Hospital, all references to the Hospital in this petition include Mr. Turner, in that capacity.

provide pathology services in the future, but did not terminate his privileges.

Dr. Manion did not challenge the fairness of the hearing itself, nor did he allege in the complaint that the adequate notice and hearing standards of Section 11112 (b) of the federal Health Care Quality Improvement Act of 1986, ("the Act" or "HCQIA"), 42 U.S.C. § 11112 (b) were not met.

The hospital moved to dismiss the complaint on September 21, 1990. The basis of the hospital's motion was that the hospital met the standards for the qualified immunity set forth under the Act. The hospital also filed an answer wherein nine defenses were pled.

By order dated November 27, 1990, the district court consolidated this action with a prior action initiated by Dr. Manion against two other pathologists, George Evans, M.D., and Shobha Pai, M.D. Drs. Evans and Pai had initially brought concerns about Dr. Manion's competence to the attention of the hospital administration and the medical staff leadership.

Thereafter, the hospital moved to stay all discovery pending resolution of the motion to dismiss. The district court granted the motion to stay discovery on April 5, 1991.[2]

The district court did not hear oral argument on the motion to dismiss. In its order dated July 8, 1991, the court treated the hospital's motion to dismiss as a motion for summary judgment without notice to the hospital, and denied that motion. The district court ruled in the

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[2] A trial date of April 13, 1992 was set by the court on October 23, 1991. On December 19, 1991 the court granted Dr. Manion's motion to compel, and discovery began. Neither party has completed discovery. Dr. Manion moved to vacate the April 13, 1992 trial date, a motion supported by the hospital. That motion was denied on March 11, 1992, the same day the court issued its *Memorandum and Order* granting reconsideration and denying the hospital's motion to dismiss (treated as a motion for summary judgment).

first of two decisions that the hospital was not entitled to HCQIA immunity because it had not reported its actions with respect to Dr. Manion to the State Medical Board of Ohio. (Appendix D at 44a) The court interpreted the Act as requiring a report to the State Medical Board of Ohio as a condition to the ability to invoke the immunity provided under the Act.

The hospital immediately moved for reconsideration of this order on July 18, 1991 on the basis that the court's decision was erroneous as a matter of law. The hospital argued that the reporting requirements of the Act were not in effect at the time and that a report actually could not be submitted prior to the opening of the National Practitioner Data Bank on September 1, 1990.

On March 11, 1992, the district court rendered a second opinion, again without hearing oral argument. (Appendix C at 15a) The court granted the hospital's motion for reconsideration, acknowledging the error in its first opinion; the court now ruled that reports to the State Medical Board of Ohio contemplated by the Act were not required prior to the September 1990 opening of the National Practitioner Data Bank. Nonetheless, the court denied the hospital's motion, stating merely that "a factual issue does exist as to whether Lima and Turner initiated the peer review proceeding with a reasonable view to further quality health care. . . ." (Appendix C at 18a)

The hospital filed a notice of appeal to the Sixth Circuit Court of Appeals on March 31, 1991 on two primary bases: (1) that the district court applied an improper subjective standard, rather than the objective standard contemplated by the Act; and (2) that since Dr. Manion did not dispute the fairness of the peer review hearing, any alleged factual issue of the subjective motives of the initiators of the peer review, *before* the hearing, was irrelevant and immaterial. Drs. Evans and Pai did not join in this appeal nor are they parties to this Petition.

Dr. Manion moved to dismiss the appeal on the basis that a denial of a motion for summary judgment is not immediately appealable. The Court of Appeals entered an order dated April 13, 1992 directing that this issue be briefed by the parties in their briefs on the merits. (Appendix B)

Argument was heard on December 2, 1992. The Court of Appeals rendered an opinion on February 26, 1993 holding that the HCQIA provides immunity from damages only and that a denial of summary judgment based on HCQIA is not immediately appealable under the collateral order doctrine. (Appendix A)

REASONS WHY THE PETITION SHOULD BE GRANTED

This case presents important public policy questions of national significance involving the Health Care Quality Improvement Act. Action by this Court is necessary to correct an error of law and also to render a definitive interpretation of the Act on an issue of critical importance to the quality and cost of health care, and to any health care reform.

In enacting HCQIA, Congress intended to encourage hospitals to improve the quality of care by protecting them from the unreasonable risk of intrusive retaliatory litigation. Towards this end, Congress provided that the qualified immunity standards of the Act be resolved objectively as a matter of law and prior to trial; the Act *presumes* that its four standards have been met. In addition, the burden is on the plaintiff physician to plead, and to demonstrate by a preponderance of the evidence, that the standards were not met.

The district court ignored this presumption, however, and treated the Act's standards as though they were affirmative defenses. Furthermore, the district court applied an improper subjective standard to assess the professional review action. The district court denied the motion to dismiss (treated as a motion for summary judg-

ment), necessitating trial under a standard squarely in conflict with the Ninth Circuit Court of Appeals in *Austin v. McNamara,* 979 F.2d 728 (9th Cir. 1992). An immediate appeal of the decision based on an erroneous legal standard was sought in order to avoid the cost and trauma of trial, against which Congress intended to protect hospitals. There is no doubt that Congress, in enacting HCQIA, intended to give hospitals protection to act to improve quality of care without threat of retaliatory suits. The Sixth Circuit, however, did not address the merits of the legal standard, finding the appeal premature.

It is respectfully submitted that the nature of the immunity provided under the Act is akin to immunity from suit rather than a mere immunity from damages, as the Sixth Circuit held. Therefore, the denial of summary judgment under the immunity standards of the Act should be immediately appealable under the collateral order doctrine.

I. THE SIXTH CIRCUIT'S HOLDING, THAT THE HCQIA GRANTS TO HOSPITALS AND PHYSICIAN PEER REVIEWERS MERELY IMMUNITY FROM DAMAGES AND NOT FROM SUIT, CONFLICTS WITH THIS COURT'S CHARACTERIZATION OF HCQIA IMMUNITY IN *SUMMIT HEALTH LTD. v. PINHAS,* 111 S.CT. 1842 (1991) AND WITH CONGRESSIONAL INTENT.

This Court, in *Summit Health, Ltd. v. Pinhas,* 111 S.Ct. 1842, 1848 n.12 (1991) characterized the immunity afforded by HCQIA as immunity from suit, stating as follows:

> The Health Care Quality Improvement Act provides *immunity from* antitrust, and other *actions* if the peer review process proceeds in accordance with [42 U.S.C.] Section 112. (Emphasis added.)

The Sixth Circuit held in the instant case, however, that the HCQIA provides merely immunity from dam-

ages. The Sixth Circuit did not acknowledge this Court's characterization of HCQIA immunity as set forth in *Pinhas*.

It is respectfully submitted that the Sixth Circuit's holding squarely conflicts with the *Pinhas* decision of this Court as well as with Congressional intent underlying the passage of the Act. Moreover, inasmuch as HCQIA, correctly construed, affords immunity from suit, not just damages, it is respectfully submitted that a denial of a motion to dismiss and/or summary judgment based on HCQIA immunity is immediately appealable.

A. The Sixth Circuit's Holding Thwarts Congressional Intent to Provide Incentive and Protection to Peer Reviewers by Forcing Most Physician Suits to Trial, Thereby Increasing Health Care Costs, Impeding Health Care Reform, and Decreasing the Quality of Health Care by Discouraging Volunteer Physician Participation in Peer Review.

Hospitals face continuing evolution of higher standards of public accountability for quality care, through case law[3] and increasingly rigorous accreditation and licensing standards. Thus, hospitals across the country have adopted high quality standards for medical staff appointment and clinical privileges. Physicians whose clinical privileges have been denied or restricted as a result of higher quality standards have frequently resorted to the courts. Many of these lawsuits have taken the form of antitrust claims, arising out of a contention that the peer review investigations conducted within the medical staff of the hospital were motivated by anticompetitive concerns. Physicians subject to peer review almost uniformly attack the subjective motives of those who initiate peer review. Dr. Manion's claims are thus typical.

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[3] *Albain v. Flower Hospital*, 553 N.E.2d 1038 (Ohio 1990); *Johnson v. Misericordia Community Hospital*, 301 N.W.2d 156 (Wis. 1981); *Thompson v. Nason Hospital*, 591 A.2d 703 (Pa. 1991).

Hospitals, faced with the specter of potential future liability to patients as a result of failing to monitor clinical practices of physicians on the staff, on the one hand, and the potential for suits brought by physicians challenging adverse actions on the other, have sought to balance those risks. In weighing these risks, protection of patients must always be paramount.

In order to encourage hospitals to continue to monitor the quality of care of physicians on their staffs and to minimize the intimidating effect of suits for damages brought by physicians, Congress in 1986 enacted the Health Care Quality Improvement Act. The Act grants qualified immunity to hospitals and physicians who engage in peer review. The Act's primary goal is to encourage hospitals to improve quality of care.

The Act provides that no professional review body nor any person participating with or assisting a professional review body, or under contract or other formal arrangement with the body, shall be liable in damages under the laws of the United States or of any state with respect to professional review actions that meet the Act's objective standards. § 11111(a). Lima Memorial Hospital, as a licensed hospital, is a professional review body protected by the Act. § 11151(11).

The Act also authorized the creation of a National Practitioner Data Bank. The Data Bank opened on September 1, 1990. Hospitals must now report "professional review actions," which include final hospital board actions adversely affecting a physician's privileges, and "surrenders" of privileges while under investigation, on federal Data Bank forms. Reports are submitted by the hospital to the appropriate state board of medicine, which in turn submits one of the copies to the Data Bank.

A professional review action is defined as an action taken in the course of professional review activity, which is based on the competence or professional conduct of

an individual physician which affects or may affect adversely the clinical privileges or staff appointment of the physician. § 11151(9).

Section 11112(c)(2) of the Act provides that § 11111(a) does not preclude an immediate suspension or restriction of privileges "where the failure to take such an action may result in an imminent danger to the health of any individual," so long as the notice and hearing requirements are met *subsequently*. Such an interim suspension occurred in this case, but was subsequently lifted subject to conditions.

Congress intended to protect those who participate in peer review actions in order to encourage them to do so. The purpose of the legislation was not merely to provide immunity from damages, but to protect the participants to the greatest extent possible from the harassment and threat posed by litigation itself. This protection is accomplished by the combination of the protection from damages in § 11111(a); the presumption in § 11112(a); and the objective nature of the analysis, as a question of law. Overall, this qualified immunity is essentially equivalent to the qualified immunity as described in cases applying the collateral order doctrine, for the reasons described below. The Court of Appeals concentrated primarily on § 11111(a) without considering the effect of the presumption of § 11112(a) and the *objective* nature of the standard.

Congress recognized that even before the Act was passed, hospitals and physician peer reviewers ultimately prevailed in almost all cases brought against them. The Report of the House of Representatives explained: "[e]ven though defendants may often win these lawsuits, that may not be sufficient to guarantee enthusiastic, or even minimally adequate, peer review." H.R. Rep. No. 99-903, 99th Cong., 2d Sess. 3, *reprinted in* 1986 U.S. Code Cong. & Admin. News 6385 ("House Report"). Congress therefore acted to increase the protection avail-

able to hospitals by providing the presumption that a peer review action meets the standards necessary for the immunity.

B. The District Court's Denial of a Motion to Dismiss or a Motion for Summary Judgment Based on HCQIA Immunity Is Immediately Appealable Under the Collateral Order Doctrine.

The denial of HCQIA immunity should be immediately appealable under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and *Mitchell v. Forsyth,* 472 U.S. 511 (1985). Without a right of immediate appeal, the right not to face the burdens of discovery and trial will be lost forever, and cannot be restored by appellate review at the end of the case. The chilling effect on peer review and quality improvement will be severe.

Moreover, the fact that this Court has recognized that denials of qualified immunity in other settings (including in cases involving governmental officials) are immediately appealable is significant. For not only are the policies underlying HCQIA immunity analogous to those underlying qualified immunity for government officers; the structure of the burden of proof for both types of immunity is also the same.

Qualified immunity entitles its possessor to "immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth,* 472 U.S. at 526. Rather, the determination "is to be made at the earliest possible point in the case, so as to protect public officials such as appellants from the threat of liability or harassing litigation that may inhibit the discharge of their official duties." *Wegener v. City of Covington,* 933 F.2d 390, 392 (6th Cir. 1991). By attaching the right to qualified immunity early in a proceeding, the individual receives protection not only from liability

but from the threat of liability and the necessary attention to pretrial matters, such as discovery, which can effectively distract these individuals from otherwise performing their public duties and discourage them from agreeing to provide this service. *Long v. Norris,* 929 F.2d 1111 at 1113 (6th Cir. 1991); *accord,* Note, *Physician Staff Privileges Cases: Antitrust Liability and the Health Care Quality Improvement Act,* 29 Wm. & Mary L. Rev. 609, 628 (1988) ("The most effective point at which to decide [the question of immunity] is prior to full trial. . . .").

Whether appellants are entitled to qualified immunity is a question of law. *Long,* 929 F.2d at 1114; *Donta v. Hooper,* 774 F.2d 716 (6th Cir. 1985), *cert. denied,* 483 U.S. 1019 (1987).

Accordingly, a court cannot avoid deciding the issue of qualified immunity by mischaracterizing as a material dispute of fact what is a question of law. *Dominque v. Telb,* 831 F.2d 673 at 677 (6th Cir. 1987). For example, in *Hunter v. Bryant,* 112 S. Ct. 534, 116 L.Ed.2d 589 (1991), the Ninth Circuit had held that whether a law enforcement officer reasonably believed he had probable cause to arrest a suspect was a question of fact unless there was only one reasonable conclusion that the jury could reach. This Court disagreed, stating:

> This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial. . . . Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.

Id. at 596.

A case arising out of facts occurring prior to the HCQIA aptly summarizes the position of hospitals today facing

physician retaliatory suits. In *Oksanen v. Page Memorial Hospital*, 945 F.2d 696 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 973 (1992), the United States Court of Appeals for the Fourth Circuit granted summary judgment on federal and state claims in favor of a hospital and defendant physicians in a suit by a physician challenging his termination from the staff. The court noted that Dr. Oksanen had been afforded a hearing at which he was represented by counsel and given the opportunity to call witnesses. The court stated:

> We are not suggesting that the antitrust laws are designed to achieve fairness or due process, but when the due process is accorded a disgruntled physician it only enhances the legitimacy of a hospital and medical staff's actions. . . . *See also*, 42 U.S.C. § 11112 (*according immunity from antitrust litigation* to peer reviewers when certain procedural safeguards are observed). . . . Where, as here, the peer review process has been operating in accordance with proper procedures, under the aegis of the hospital, and with a substantial basis in the evidence, the likelihood of an antitrust conspiracy is also substantially diminished.

Id. at 708. (Emphasis added; it is noteworthy that the Fourth Circuit assumed that the immunity was protection from litigation not merely damages.)

The Fourth Circuit Court of Appeals' final words succinctly state the dilemma faced by all hospitals today and demonstrate why these issues are crucial to the public interest:

> This case illustrates well the dilemma that hospitals face when they consider disciplining a physician by altering his admitting privileges. On the one hand, if the hospital failed to discipline a physician against whom documented complaints were legion, the efficiency of the entire institution could be affected and the hospital could even be exposing itself to malpractice liability. Yet, if the hospital takes corrective action, it and its medical staff face the prospect of a

> disgruntled physician bringing an antitrust suit against them.
>
> In our view, the antitrust laws were not intended to inhibit hospitals from promoting quality patient care through peer review nor were the laws intended as a vehicle for converting business tort claims into antitrust causes of action. While we cannot say that no peer review decision would ever implicate the Sherman Act's concern for competition, this assuredly is not such a case. Page Memorial simply took measured steps to discipline an imperious physician. In taking these actions, Page Memorial and its medical staff have violated neither federal nor state law.

Id. at 711.

When health care professionals engage in peer review, they stand in the same unique position as public officials. "A non-profit private hospital serving the public generally is a quasi-public institution whose obligation to serve the public is the linchpin of its public trust and the fiduciary relationship which arises out of the management of that trust." *Garrow v. Elizabeth General Hospital,* 401 A.2d 533, 537 (N.J. 1979).

The Sixth Circuit Court of Appeals reviewed portions of the legislative history of the Act, but based its analysis on what it saw as one determinative factor—whether the Act provides immunity from monetary damages, or immunity from suit. The court noted what it characterized as the strong "policy against piecemeal appeals" underlying the collateral order doctrine. The court concluded: "We should not rush to conclude from the less than precise language used in the report and by witnesses before the committee that there was a clear legislative intent to create such a hybrid immunity from suit." 986 F.2d at 1041. The court was unable to find in the Health Care Quality Improvement Act an "explicit" guarantee that trial not occur. In support of this statement, the court cited *Midland Asphalt Corp. v. United States,* 489 U.S. 794 (1989). *Id.* at 1042.

The Tenth Circuit Court of Appeals reached a similar result in *Decker v. IHC Hospitals, Inc.*, 982 F.2d 433 (10th Cir. 1992), *petition for cert. filed,* also relying upon *Midland Asphalt,* and similarly analyzing § 11111 (a) in isolation from the remainder of the Act. Neither Court of Appeals considered the presumption under § 11112(a) or the objective nature of the standard.

However, subsequent to both the decision in *Decker* and the argument in the instant case, this Court, in *Puerto Rico Aqueduct,* addressed the distinction between "immunity from suit" and "immunity from liability" in terms of the *rationale* for extending the *Cohen* and *Mitchell* collateral order doctrine to claims of Eleventh Amendment immunity. This Court stated: "The value to the States of their Eleventh Amendment immunity, like the benefit covered by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice," 113 S.Ct. at 688. There, this Court made it clear that the policy reasons established in *Cohen* (motion to compel plaintiffs in a shareholder derivative suit to post bond) and *Mitchell* required extension to Eleventh Amendment cases. In *Puerto Rico Aqueduct,* 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) this Court explained that in *Mitchell,* this Court found that absent immediate appeal, the "central benefits of qualified immunity—avoiding the costs and general consequences of subjecting public officials to the risks of discovery and trial—would be forfeited, much as the benefit of the bond requirement would have been forfeited in *Cohen.*" *Id.* at 687. This Court rejected a "narrow view" of such immunity. Just as a narrow view "misunderstands the role of the [Eleventh] Amendment in our system of federalism," *id.* at 688, so does a narrow view of the HCQIA misunderstand the important role of peer review in health care recognized by Congress.

The Court of Appeals, failing to find an explicit statement in the Act's legislative history, struck the balance toward a policy against piecemeal appeals:

> On the other hand, the existence of limited immunity from suit only in a class of damage claims increases the potential for piecemeal appeals, since a successful appeal of an order denying that immunuity would not necessarily conclude the proceedings, as injunctive and declaratory claims could remain. Accordingly, we should not rush to conclude from the less than precise language used in the report and by witnesses before the committee that there was a clear legislative intent to create such a hybrid immunity from suit. (Footnote omitted.)

986 F.2d at 1042.

However, the practical effect of this conclusion is likely to be counterproductive. If most cases in which a physician attacks the subjective motives of the initiators of peer review are forced to trial, many trials will have been held unnecessarily, exposing hospitals and physicians to increased costs and making them more reluctant to take actions to protect patients. Most will likely be reversed on appeal under a proper objective standard as a matter of law. Greater judicial resources will be consumed than would occur if interlocutory appeals were permitted.

Most importantly, the resultant diminution in quality care cannot be measured in dollars nor can quality be restored after the fact. Patients now justifiably rely on hospitals to conduct peer review. Congress intended the Act to bring about improvement in quality, a good that is now seriously threatened.

II. THE SIXTH CIRCUIT'S DECISION, WHICH WILL IN ESSENCE ALLOW A PHYSICIAN SUBJECT TO PEER REVIEW UNDER HCQIA TO FORCE A TRIAL TO ATTACK THE SUBJECTIVE MOTIVES OF THE HOSPITAL THAT INITIATED PEER REVIEW, CONFLICTS WITH THE NINTH CIRCUIT'S DETERMINATION IN *AUSTIN v. McNAMARA*, 979 F.2d 728 (9th Cir. 1992), THAT HCQIA MANDATES THAT AN OBJECTIVE, NOT A SUBJECTIVE STANDARD BE USED, AS A MATTER OF LAW, TO ASSESS PROFESSIONAL REVIEW ACTIONS UNDER THE PRESUMPTION OF THE HCQIA.

If the Sixth Circuit Court of Appeals decision is left to stand, a conflict with the Ninth Circuit will be created, since the instant case will go to trial under the district court's improper subjective standard. The Ninth Circuit Court of Appeals has recognized that the Act creates an objective standard. *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992).

In *Austin*, the Ninth Circuit Court of Appeals stated that the Act was intended "to provide for effective peer review" and "to grant qualified immunity from damages for those who participate in peer review activities. . . . Because Austin seeks only damages, he can maintain this action only with respect to those acts that are not entitled to immunity. . . ." 979 F.2d at 733. The court held that because the test is an objective one, alleged bad faith is immaterial: "The real issue is the sufficiency of the basis for the defendants' actions." *Id.*

Another federal district court in California has analogized the immunity provided in the Act to the qualified immunity for governmental officials articulated by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In *Fobbs v. Holy Cross Health System Corp.*, 789 F. Supp. 1054 (E.D. Cal. 1992), *appeal pending*, the court granted summary judgment to a hospital in a suit brought by a physican who alleged that the peer review action was motivated by racial prejudice and anticompetitive

motives. In *Fobbs,* the court held that the immunity provided in the HCQIA was "similar to the objective standard" used in *Harlow.* In addition, the court held that the determination of whether a hospital was entitled to immunity under this objective standard was "a matter of law."

The court in *Fobbs* further recognized that Congress intended the HCQIA to provide defendants with immunity during the early stages of litigation, "not just a defense at trial." *Id.* at 17. The *Fobbs* court in so holding quoted from the legislative history of the Act. H.R. Rep. No. 99-903, 99th Cong. 2d Sess. 3, *reprinted in* 1986 *U.S. Code Cong. & Admin. News* 6384-6394. *Fobbs* and *Austin* are the only two reported decisions to date that have addressed the Act's standards.

The district court in this matter, however, did not even address the presumption set forth in Section 11112(a). Contrary to *Austin,* the district court applied a subjective standard as to the alleged motives of those who *initiated* the peer review of Dr. Manion. Dr. Manion never contested the fairness of the subsequent hearing. That peer review hearing confirmed the legitimacy of the quality concerns—misdiagnosis by Dr. Manion—underlying the initiation of peer review.

The immunity under the Act is best characterized as "qualified" for several reasons. A professional review action must meet the standards set forth in Sec. 11112 (a), although professional review actions are presumed to meet those standards unless rebutted by a preponderance of the evidence. Moreover, the Act expressly does not extend to civil rights actions, or to actions by any state or federal attorney general, or to actions for declaratory or injunctive relief. There is thus an immunity from the intrusive effects of trial for alleged acts falling within the scope of Section 11112 if the standards are met, analyzed as a matter of law under an objective standard. A court's denial of summary judgment must

be immediately appealable to correct an error where the court looks solely to allegations of the subjective motives of the initiators of peer review, without any consideration of the plaintiff's burden under the presumption. Otherwise, every case will go to trial because every physician will attack the subjective motives of peer reviewers.

As more suits proceed to trial, the chilling effect on peer review that Congress intended to remedy will once again take force. Insurance premiums for hospitals—malpractice, general liability, and directors' and officers' —will undoubtedly increase. Quality will suffer as physicians once again become reluctant to volunteer to serve as peer reviewers. Any prospects for health care reform will be clouded by a resurrection of the problems Congress attempted to rectify in 1986.

If disgruntled physicians can force a case to trial merely by claiming that there is a factual issue as to the subjective motives of peer reviewers, the Act will be rendered meaningless.

CONCLUSION

Congress struck a balance between quality and protection of the reputation and economic interests of physicians. The Act itself presents a delicate balancing of the various interests involved. It provides ample protection for physicians by establishing, in effect, a national standard (or "safe harbor")[4] for adequate notice and hearing procedures. If physicians, unhappy with the outcome of hospital hearings, even though the hospital has met the standards, are permitted to compel a jury trial by simply alleging "facts" regarding the subjective motivation of the initiators of an investigation, the entire purpose of the

[4] An excellent analysis of the Act's legislative history and objectives is provided in Adler, Robert S., *Stalking the Rogue Physician: An Analysis of the Health Care Quality Improvement Act*, 28 Am. Bus. L.J. 683 (1991). The author was counsel to the Subcommittee on Health and the Environment of the House Energy and Commerce Committee at the time the Act was drafted.

Act, and the internal hearing review process the Act intended to be the forum to address such issues, will be undermined. Patients will suffer. The decision of the Court of Appeals tips the balance away from patient care and toward the economic interests of physicians. This result creates a conflict with this Court's decision in *Pinhas* and with the standard enunciated by the Ninth Circuit Court of Appeals in *Austin*, and will wreak havoc within hospital medical staffs until a clear standard is enunciated by this Court. Petitioners urge this Court to grant the Petition.

Respectfully submitted,

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May 25, 1993

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 92-3313

WILLIAM L. MANION, M.D.,
Plaintiff-Appellee,

v.

GEORGE EVANS, M.D.,
Defendant,

LIMA MEMORIAL HOSPITAL and GREGORY TURNER,
Defendants-Appellants.

On appeal from the United States District Court
for the Northern District of Ohio

Decided and Filed February 26, 1993

Before: NORRIS and SILER, Circuit Judges; and EDGAR, District Judge.*

ALAN E. NORRIS, Circuit Judge, Defendants Lima Memorial Hospital and its president, Gregory Turner, appeal the district court's denial of summary judgment in plaintiff Dr. William L. Manion's antitrust action based

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* The Honorable R. Allan Edgar, United States District Judge for the Eastern District of Tennessee, sitting by designation.

upon the theory of bad faith peer review. The district court held that there was a genuine issue of material fact regarding whether the Health Care Quality Improvement Act, 42 U.S.C. §§ 11101-11152, shielded defendants from liability. Because we conclude that the decision denying defendants' motion for summary judgment is not an appealable order, we dismiss the appeal.

I.

The early 1980s witnessed a new trend in health care litigation as states and health care accrediting bodies stepped up their promotion of peer review—the process by which physicians judge the competence of their fellow professionals and recommend disciplinary action for those found dangerously incompetent. As this process gathered force, physicians aggrieved by the results of peer review increasingly appeared in federal court claiming that the actions of their peers were anti-competitive and violated federal antitrust laws. Although hospitals and peer review participants generally prevailed in these lawsuits, the victories entailed costly and time-consuming litigation.

Congress attempted to remedy this situation in 1986 by enacting the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. §§ 11101-11152. In the Act itself, Congress explained the purposes behind this particular piece of legislation:

> The Congress finds the following:
>
> (1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.
>
> (2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.

> (3) This nationwide problem can be remedied through effective professional peer review.
>
> (4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.
>
> (5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

42 U.S.C. § 11101.

The Act creates a form of protection from liability in damages for hospitals and peer review participants. Although it never actually uses the term "immunity," the Act provides that if a "professional review action" meets the Act's standards, the peer reviewers "shall not be liable in damages under any law of the United States or of any State . . . with respect to the [professional review] action." 42 U.S.C. § 11111(a)(1).

To be entitled to this protection, peer reviewers must satisfy the four "standards" or conditions precedent provided in § 11112(a). That section requires that professional review action be taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts . . . .

42 U.S.C. § 11112(a). The review action is presumed to have met these standards "unless the presumption is rebutted by a preponderance of the evidence." *Id.*

II.

In 1988, peer reviewers at Lima Memorial Hospital, acting on allegations of incompetency, suspended the clinical privileges of plaintiff, a pathologist at the hospital. After exhausting in-house appeals, plaintiff sued the hospital, its president, and the hospital's other pathologists in federal court, raising alleged antitrust violations and numerous state-law causes of action. The appealing defendants moved for summary judgment on the basis that they are immune from suit under HCQIA. The district court denied the motion because it concluded that there was a genuine dispute concerning whether defendants complied with the standards found in § 11112(a). It is that order from which defendants appeal.

III.

Plaintiff asserts that this court lacks jurisdiction to hear the appeal because the district court order is not appealable. Since, as a general rule, denial of summary judgment is not a final order under 28 U.S.C. § 1291, *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (19663, the district court's decision must fit within the collateral order exception to the finality requirement of § 1291 in order to be appealable. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The decision must "finally determine claims of right separable from, and collateral to, rights asserted in the action." *Id.* at 546.

To come within the collateral order exception, an order must:

> [1] conclusively determine the disputed question[;]
>
> [2] resolve an important issue completely separate from the merits of the action[;] and

> [3] be effectively unreviewable on appeal from a final judgment.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (refining *Cohen test*). An order is effectively unreviewable on appeal from a final judgment when it involves an asserted right the practical value of which would be destroyed if it were not vindicated before trial. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 800 (1989).

Relying upon this rationale, the Supreme Court has allowed immediate appeals from orders denying qualified immunity to public officials in actions brought by citizens alleging violations of rights guaranteed by the Constitution. Qualified immunity is "*immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). This "right not to *stand trial*," *id.*, has been considered essential by the Supreme Court when it was asked to apply the collateral order exception in other contexts. In *Abney v. United States*, 431 U.S. 651 (1977), the Court concluded that denial of a motion to dismiss an indictment on double jeopardy grounds was immediately appealable, since the defendant was "contesting the very authority of the Government to hale him into court." *Id.* at 659. *See also Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (speech or debate clause designed to protect members of Congress "not only from the consequences of litigation's results but also from the burden of defending themselves.").

On the other hand, orders denying rights that do not include protection from burdensome litigation are not immediately appealable. For example, the denial of a motion to dismiss based upon an extradited person's immunity from civil process is not immediately appealable because the "right not to be burdened with a civil trial itself is not an essential aspect of this protection." *Van*

Cauwenberghe v. Biard, 486 U.S. 517, 525 (1988). In *Van Cauwenberghe,* the Court underscored the narrow scope of the collateral order exception:

> The critical question, following Mitchell, is whether "the essence" of the claimed right is a right not to stand trial. This question is difficult because in some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial. But the final-judgment rule requires that except in certain narrow circumstances in which the right would be "irretrievably lost" absent an immediate appeal, litigants must abide by the district court's judgments, and suffer the concomitant burden of a trial, until the end of proceedings before gaining appellate review.

Id. at 524 (citations omitted). *See also Lauro Lines S.R.L. v. Chasser,* 490 U.S. 495 (1989) (order denying motion to dismiss on basis of forum selection clause not immediately appealable).

Moreover, the Supreme Court has warned lower courts to exercise restraint when considering whether a particular right includes protection from the exigencies of trial. "One must be careful . . . not to play word games with the concept of a 'right not to be tried.' . . . A right not to be tried in the sense relevant to the *Cohen* exception rests upon *an explicit statutory or constitutional guarantee that trial will not occur." Midland Asphalt Corp.,* 489 U.S. at 801 (emphasis added) (order denying motion to dismiss indictment due to government's disclosure of matters before the grand jury not immediately appealable). *See also Marrical v. Detroit News, Inc.,* 805 F.2d 169 (6th Cir. 1986) (narrow language of Michigan courts in describing that state's qualified immunity results in protection only from liability, not from suit; order not immediately appealable).

IV.

With this case law in mind, we turn to HCQIA to determine whether the Act includes a right not to stand trial, in which case the district court's decision would be immediately appealable, or whether it offers only protection from liability for damages, which would not support an immediate appeal. We initially point out that the Act does not label its protection an "immunity from suit." Instead, § 11111(a)(1) provides that if a professional review action meets the Act's standards, the peer review participants "shall not be *liable in damages.*" 42 U.S.C. § 11111(a)(1) (emphasis added). Significantly, an earlier version of this section provides that the professional review body "*shall not be subject to an action* or [be] liable under any . . . law." H.R. 5110, 99th Cong., 2d Sess. (1986), *reprinted in The Health Care Quality Improvement Act of 1986: A Legislative History*, at 196 (Bernard D. Reams ed. 1990) (emphasis added). The above-quoted italicized portion was deleted during committee consideration.

The House Committee on Energy and Commerce includes an explanation for the revision in its report of September 26, 1986:

> The purpose of this legislation is to improve the quality of medical care by encouraging physicians to identify and discipline other physicians who are incompetent or who engage in unprofessional behavior.
>
> Under this bill, hospitals and physicians that conduct peer review will be protected from damages in suits by physicians who lose their hospital privileges, provided the peer review actions meet the due process and other standards established in the bill. . . .
>
> . . . .
>
> To assure that the medical profession cooperates in this system, the Committee believes it is essen-

tial to provide some legal immunity to doctors and hospitals that engage in peer review activities. . . .

. . . .

. . . Doctors who are sufficiently fearful of the threat of litigation will simply not do meaningful peer review. The result would be to continue the possibilities for abuse by bad doctors.

Thus, there is a clear need to do something to provide protection for doctors engaging in peer review . . . . To that end, the bill provides limited, but essential immunity. Doctors and hospitals who have acted in accordance with the reasonable belief, due process, and other requirements of the bill are protected from damages sought by a disciplined doctor. . . .

. . . .

SECTION-BY-SECTION ANALYSIS

. . . .

Title I—Promotion of professional review activities

Section 101

Precludes damages against professional review bodies and persons taking professional review actions that meet the standards defined in section 102.

. . . .

DISCUSSION: COMMITTEE VIEWS

. . . .

Subsection (a) provides limited, but essential, protection from liability for persons conducting professional conduct of individual physicians. To qualify for the protection, the professional review action must meet the standards specified in section 102(a) and must be an action as defined in section 301(9). If those criteria are met, the persons engaging in or assisting in the conduct of professional review

action shall not be liable in damages with respect to the action.

The Committee feels that the purposes of this bill require protection for persons engaging in professional review. Under current state law, most professional review activities are protected by immunity and confidentiality provisions. A small but growing number of recent federal anti-trust actions, however, have been used to override those protections. Because the reporting system required under this legislation will most likely increase the volume of such suits, the Committee feels that some immunity for the peer review process is necessary.

Initially, the Committee considered establishing a very broad protection from suit for professional review actions. In response to concerns that such protection might be abused and serve as a shield for anti-competitive economic actions under the guise of quality controls, however, the Committee restricted the broad protection. As redrafted, the bill now provides protection only from damages in private actions, and only for proper peer review, as defined in the bill. The bill leaves completely intact the jurisdiction of the Federal Trade Commission, the Justice Department, and State Attorneys General to bring antitrust actions. In addition, the bill does not restrict the rights of physicians who are disciplined to bring private causes of action for injunctive or declaratory relief. In the professional review actions being challenged fail to meet the standards of section 102(a), no immunity is provided and the suit can be tried without regard to the provisions of this bill.

H.R. Rep. No. 903, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 6384, 6384-6391. The Court of Appeals for the Tenth Circuit views this legislative history as persuasive evidence that HCQIA's pro-

tection is immunity from liability only and that orders denying motions to dismiss based upon HCQIA are not immediately appealable. *Decker v. IHC Hospitals, Inc.*, Nos. 91-4160, 91-4161, 1992 WL 384933 (10th Cir. Dec. 29, 1992).

The congressional committee's rejection of the earlier version's "very broad protection from suit" supports the conclusion that the protection ultimately enacted is only from liability for damages, not from suit. However, the language quoted above from the committee report, when read in its entirety, sends mixed signals. For example, imprecise terms such as "protected from damages in suits by physicians," "some legal immunity," "limited immunity," "precludes damages," "protection from liability," and "not liable in damages" are used interchangeably. Furthermore, since the government entities are said to be able "to bring . . . actions," and even disciplined physicians still can "bring private causes of action for injunctive or declaratory relief," it would seem by implication that what the Act prohibits is the ability of disciplined physicians to bring suit for damages. Under that interpretation, the Act would establish more than just a guarantee against having to pay a judgment; it would offer peer deviewers protection from having to defend private damage claims at all. The committee's use of the language "the bill now provides protection only from damages in private actions" is not inconsistent with this understanding, when it is read in the context of the entire portion quoted from the report. Moreover, during hearings committee members and witnesses often referred to "immunity from monetary damage actions" or "immunity from damage claims." [1]

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[1] *Hearings on H.R. 5540 Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Committee*, 99th Cong., 2d Sess. (1986) (letter from Justice Department; statement of Rep. Edwards), *reprinted in The Health Care Quality Improvement Act: A Legislative History*, at 30, 93 (Bernard D. Reams ed. 1990). One witness objected that the quality care and due

If parsing this legislative history leads to the conclusion that Congress intended that peer reviewers could be subject to suit by government agencies, but that private actions against them be limited to suits for injunctive and declaratory relief, then one could argue that the statute conferred upon peer reviewers some form of hybrid immunity from suit. Immunity from suit in actions for damages brought by disciplined physicians at least would be consistent with the Act's policy of encouraging robust peer review.

On the other hand, the existence of limited immunity from suit only in a class of damage claims increases the potential for piecemeal appeals, since a successful appeal of an order denying that immunity would not necessarily conclude the proceedings, as injunctive and declaratory claims could remain.[2] Accordingly, we should not rush to conclude from the less than precise language used in the report and by witnesses before the committee that there was a clear legislative intent to create such a hybrid immunity from suit.

The policy that the Act announces in its findings refers only to protection from damages. "The threat of private

---

process standards the hospital must satisfy to get the protection would merely "add more legal issues for both sides to bounce around on moving to dismiss the damage counts." *Id.* (statement of Arthur Lerner, Michael & Wishner, P.C., Washington D.C.), *reprinted in* Reams, *supra*, at 98-99. While this was only the comment of one witness, it suggests an assumption that the Act would allow summary dismissals of the damage claims.

[2] We recognize that this threat of piecemeal appeals also exists in the context of public official qualified immunity from declaratory or injunctive actions. *Spruytte v. Walters*, 753 498, 510 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). However, the Supreme Court has stressed that the protection from damages for public officials is so important that it justifies this risk. *See generally Mitchell*, 472 U.S. 511. Without any indication from Congress that HCQIA's safeguards are equally essential, we refuse to accept that risk here.

money damage *liability* under Federal laws, including treble damage *liability* under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review." 42 U.S.C. § 11101(4) (emphasis added). The findings make no mention of the threat of protracted litigation, and are consistent with the narrow language of § 11111(a)(1), that peer reviewers "shall not be liable in damages."

In sum, we are unable to find in HCQIA's grant of statutory protection the kind of *explicit* guarantee that trial will not occur that is demanded by Supreme Court case law. *See Midland Asphalt*, 489 U.S. at 801. The language of HCQIA does not announce clearly that the essence of the protection it grants is the right not to stand trial. To be sure, one can discern from the legislative history a generalized concern by Congress that peer reviewers should not be required to respond in damages. Unfortunately, neither in the legislative history nor in the language it drafted did Congress clearly point out whether its response to that concern was a grant of immunity from suit or the grant of a mere defense to liability for an award of damages. We are then left to conclude that all the statutory language accomplishes with certainty is to shield peer reviewers from liability for payment of damages. In view of the Act's narrow language, the ambiguous legislative history, and the strong policy against piecemeal appeals, we conclude that the Act does not confer a right not to stand trial, and that the district court's order declining summary judgment is therefore not immediately appealable.

V.

The appeal is dismissed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 92-3313

WILLIAM L. MANION, M.D.,
Plaintiff-Appellee,
v.

GEORGE EVANS, M.D.,
Defendant,

LIMA MEMORIAL HOSPITAL; GREGORY TURNER,
Defendants-Appellants.

ORDER

[Filed April 13, 1992]

BEFORE: KENNEDY, NELSON and BATCHELDER, Circuit Judges.

Defendants appeal the district court's denial of their motion for summary judgment on the grounds of the qualified immunity under the provisions of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11111(a)(1). Plaintiff moves to dismiss the appeal, asserting that the notice of appeal, filed within thirty days of the district court's determination of the appellants' motion for reconsideration, was untimely. In addition, plaintiff asserts that the order denying summary judgment is a non-appealable, interlocutory order. Appellants oppose the motion to dismiss.

Upon review, we conclude that it is preferable to address the issues raised in the motion to dismiss following briefing and argument. In addition to seeking to dismiss the appeal as untimely, the motion involves issues of first impression concerning the nature of the immunity granted by the Health Care Quality Improvement Act of 1986.

It therefore is ORDERED that the panel declines to rule on the motion to dismiss at this time and the parties are directed to address the issues raised in the motion to dismiss in their briefs on the merits.

ENTERED BY ORDER
OF THE COURT

/s/ [Illegible]
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:89CV7436

WILLIAM L. MANION,
Plaintiff

vs.

GEORGE EVANS, *et al.*,
Defendants

MEMORANDUM AND ORDER

[Filed March 11, 1992]

POTTER, J.:

This matter is before the Court on defendants Lima Memorial Hospital's (Lima) and Gregory Turner's (Turner) motion for reconsideration of their motion for summary judgment, plaintiff's opposition, defendants' supplemental memorandum and plaintiff's supplemental opposition. Defendants request that the Court reconsider the part of its July 8, 1991 order denying these two defendants' summary judgment motion.

Motions for reconsideration are generally not encouraged and serve a very limited function: "(1) to correct manifest errors of law or fact; (2) to present newly discovered evidence; or (3) to bring to the court's attention a controlling or significant change in the law or facts that have taken place since the issue was decided by the court." *Automatic Liquid Packaging, Inc. v. Dominik*, No. 86C5595, 1987 WL 26149 (N.D. Ill.

Dec. 2, 1987) (unreported), *aff'd,* 909 F.2d 1001 (7th Cir. 1990) (citing *Keene Corp. v. Int'l Fidelity Ins. Co.,* 561 F. Supp. 656, 665 (N.D. Ill. 1982), and *Refrigeration Sales Co. v. Mitchell-Jackson, Inc.,* 605 F. Supp. 6, 7 (N.D. Ill. 1983)). See also *Cale v. Johnson,* 861 F.2d 943, 947 (6th Cir. 1988), ("[T]he major grounds that justify reconsideration involve an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.").

Defendants filed this motion because of three alleged flaws in the Court's previous Order: (1) the Court improperly usurped the power of the Secretary of Health and Human Services (Secretary); (2) the Court erred in correlating the state reporting requirements to the Health Care Quality Improvement Act's (HCQIA) immunity; and (3) the Court erred because no mechanism was in place to report action pursuant to provisions of the HCQIA.

Defendants' motion for summary judgment raised difficult issues concerning immunity from suit under HCQIA. The Court resolved these questions after exhaustive consideration. Yet, because defendants raise perplexing questions and because this area of law is relatively new, the Court will grant the motion for reconsideration and revisit defendants' motion for summary judgment.

The Court previously denied defendants' summary judgment motion on the basis that defendants lost the immunity provided under 42 U.S.C. § 11111(a) because they failed to comply with the reporting requirement as stated in 42 U.S.C. § 11133(a). This finding by the Court was based on the law and facts presented to the Court by the parties. The parties have now factually supplemented their presentation and further endeavored to define the applicable law.

Initially, the Court notes that case law has not addressed this specific issue. In other cases, the health care

entities seeking immunity under this Act have at the very least attempted to comply with the Act's reporting requirements. Here, it is undisputed that defendants neither reported to nor inquired of any state or federal agency for information regarding reporting under HCQIA. It is also uncontested that in 1988 and 1989 the State Medical Board of Ohio was equipped to receive and did receive reports made under state law by Ohio hospitals concerning formal disciplinary procedures about Ohio physicians.

However, pursuant to this new evidence provided by defendants, the Court concludes that the Secretary did indeed suspend all reporting required by 42 U.S.C. § 11133 until the establishment of the National Practitioner Data Bank. Specifically, the Court notes that the Secretary stated that "individuals and entities will not be held responsible for any reporting requirements of the Act until the National Data Bank has been established and the Secretary has announced its operations." 53 Fed. Reg. 9264 (March 21, 1988). The Secretary also regarded "the immunity provisions [Part A] of the Act as self-implementing." *Id.*

The Data Bank opened on September 1, 1990. 55 Fed.Reg. 148 (August 1, 1990). Effective that date, all individuals and entities were required to begin reporting; the Act requires no retroactive reporting. The actions defendants took against plaintiff occurred on or before August, 1988, more than two years before the Data Bank opened.

Based on the newly-presented facts and law, the Court concludes that defendants did not have a duty to report the actions taken against plaintiff because they occurred before the Data Bank opened. Therefore, to the extent that the Court's previous Order differs with this result, the Order is amended.[1]

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[1] Plaintiff's state claims remain viable. The immunity privilege applies to state law action involving professional review effective

This prior improvident finding caused the Court to limit its consideration of plaintiff's other arguments, which, after revisiting, the Court now finds are sufficient to deny defendants' motion for summary judgment. The Court concludes that a factual issue does exist as to whether Lima and Turner initiated the peer review proceeding with a reasonable view to further quality health care as required under 42 U.S.C. 11112(a). Also, whether or not this case does in fact grow out of testimony or recommendations taken during a peer review proceeding or whether it stems from a variety of separate events and conduct which resulted in the institution of peer review proceeding presents a factual issue. Defendants' motion, in any event, can only be directed to plaintiff's antitrust count.

Because the Court determines that defendants are not entitled to summary judgment regardless of whether they reported or not, defendants' other arguments are immaterial. However, the Court finds it necessary to address defendants' claim that the Court lacks jurisdiction to hold that defendants lost their immunity under HCQIA. Defendants allege that pursuant to 42 U.S.C. § 11133(c), the Secretary, not the Court, has the exclusive authority to terminate a health care entity's immunity for failure to comply with HCQIA reporting requirements.

As stated in its previous order, it is the Court that initially determines whether HCQIA immunity applies to defendants; this decision is made on a case by case determination prior to trial. *Austin v. McNamara,* 731 F. Supp. 934, 938 (C.D. Cal. 1990); *See also Goldsmith v. Harding Hospital, Inc.*, 762 F.Supp. 187 (S.D.Ohio 1991); *Tambone v. Memorial Hospital,* 825 F.2d 1132

October 14, 1989 unless a state elects to opt in early. 42 U.S.C. § 11111(c). Here, the professional review actions involving the parties occurred in 1988 and spring of 1989. The State of Ohio did not opt in early under the HCQIA. Lauren Lubow affidavit. Consequently, the immunity provisions do not apply to this case for the remaining state causes of action.

(7th Cir. 1987). A defendant qualifies for immunity under HCQIA if, among two other requirements, it demonstrates that "the results of the professional review actions were properly reported to the state authorities in compliance with 42 U.S.C. §§ 11131(c)(1), 11151(2)." *Austin*, 731 F. Supp. at 939.

The only interpretation of these cases which makes sense when read in conjunction with § 11133(a)(1) is that the Court determines if the three factors in *Austin* —due process, reporting and relevant time period—were met on a case by case basis. If the health care entity complies with all three requirements, the defendants are entitled to immunity under this Act for this particular case. If, however, the Court determines that one of these elements is missing, defendants are not entitled to HCQIA immunity for this cause of action. Subsequently, if the Secretary learns of the noncompliance under the HCQIA, then the Secretary may impose a penalty or sanction under § 11111(b) and after notice, hearing and publication, terminate immunity prospectively for a three year period. This interpretation is consistent with the legislative history of the Act, the Act itself and the case law on this subject.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendants Lima's and Turner's motion for reconsideration be, and hereby is, GRANTED; and it is

FURTHER ORDERED that defendants Lima's and Turner's motion for summary judgment be, and hereby is, DENIED.

/s/ John W. Potter
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:89CV7436

WILLIAM L. MANION,
Plaintiff

vs.

GEORGE EVANS, *et al.*,
Defendants

MEMORANDUM AND ORDER

[Filed July 8, 1991]

POTTER. J.:

This cause is before the Court on defendant Evans' motion for summary judgment, plaintiff's opposition, and defendant's reply. In an order dated November 27, 1990, the Court consolidated this case with another case currently pending on its docket: *William L. Manion v. Lima Memorial Hospital, et al.,* Case No. 3:90CV7377. In Case No. 3:90CV7377, defendants Lima Memorial Hospital and Gregory W. Turner filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), plaintiff opposed defendants' motion, and defendants replied. The Court will resolve all pending motions in the instant order.

Plaintiff is a medical doctor who was once employed by Lima Memorial Hospital (Lima) as a pathologist. In June of 1987, defendant Gregory W. Turner (Turner), then President of Lima, recruited plaintiff for the posi-

tion of Acting Chairman of the hospital's Pathology Department. Plaintiff began working in that position on July 1, 1987 and became Chairman of the Pathology Department in January, 1988. Turner also recruited defendant Dr. George A. Evans (Evans) who was hired as a staff/associate pathologist pursuant to a letter agreement on August 2, 1987. Evans commenced employment with Lima in June, 1988. The events leading to this lawsuit commenced shortly after Evans arrived at the hospital and culminated with a letter written to plaintiff by John C. Weir, Acting President and Chief Executive Officer of the hospital, dated October 17, 1989 notifying plaintiff that "the Hospital is not now nor will be making any offer to you for contractually providing pathology services to the Hospital." During the interm, plaintiffs and Evans were two of the three pathologists employed by Lima. The other pathologist was defendant Dr. Shobha Pai (Pai).

In July of 1988, plaintiff asked Evans to review the slides of two prostate cases which plaintiff was assigned. Though plaintiff's recitation of the facts surrounding this event differs drastically from Evans' version of the event, Evans arrived at diagnoses in the cases which were different from plaintiff's diagnoses. Evans diagnosed the cases as involving a benign prostate disease, though he claims that he believed that plaintiff had diagnosed the cases as involving "focal well-differentiated adenocarcinoma of the prostate," a malignant cancer. Evans believes a misdiagnosis of the cases could have resulted in the unnecessary castration of the patients. At the time Evans examined the slides, plaintiff was on vacation and thus unavailable for consultation. Therefore, Evans diagnoses were the diagnoses sent to each patient's chart.

Disturbed by what he felt were clear misdiagnoses, Evans approached Pai. The two pathologists discussed what each believed to be plaintiff's deficiencies in pathological skills and repeated inability to arrive at correct

diagnoses in simple cases. Evans and Pai then met with Paul Woehlke, a Vice President at Lima and administrative representative, to discuss their concerns about plaintiff's pathological skills. Evans claims that Mr. Woehlke asked them to raise their concerns with Turner. Next, Evans, Pai, and Woehlke met with Turner, and Evans advised Turner that he believed plaintiff to be a threat to patient safety. On August 3, 1988, while plaintiff was still on vacation in New Jersey, Mr. Woehlke telephoned plaintiff and advised plaintiff of Turner's decision to summarily suspend plaintiff. Turner personally informed plaintiff of the suspension when plaintiff returned to work on August 8. Plaintiff claims that the reason Turner and Woehlke gave for suspending him was that his colleagues could not recommend him for advancement from provisional to active status on the medical staff. Plaintiff's Exhibit 13, attached to his opposition to defendant Evans' motion for summary judgment, is a letter dated August 8, 1988 from Turner to plaintiff confirming plaintiff's summary suspension. This letter provides that: "As we have discussed, the reason for this [summary suspension] is due to the lack of recommendation from your colleagues regarding your advancement from Provisional Status to Active Status of the Medical Staff Membership." [1]

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[1] Interestingly, Exhibit 12 to plaintiff's opposition to Evans' motion for summary judgment is a letter dated August 2, 1988 from Mrs. Sue Breckenridge, Medical Staff Coordinator, to plaintiff. This letter notified plaintiff that his one year term as a provisional member of the hospital staff was about to expire and asked plaintiff to choose which section of the medical staff to which he wished to be advanced. Plaintiff was provided with only two options. He had to choose between advancing to either the Active Staff or the Courtesy Staff. This Exhibit also discloses that plaintiff did not make his choice and request advancement to Active Staff until August 8, 1988, the same day that he was notified that his peers could not recommend him for advancement. Thus, it appears that the hospital and plaintiff's peers knew of plaintiff's desire to become part of the Active Staff prior to the time that plaintiff formally communicated that desire.

On August 22, 1988, plaintiff appeared before the Medical Staff Executive Committee (MSEC). The MSEC had met to review plaintiff's summary suspension. The MSEC heard testimony from plaintiff as well as Evans and Pai. After hearing this testimony, the MSEC voted to continue plaintiff's summary suspension. It also authorized an independent review of pathology services at Lima. Plaintiff's Exhibit 14 is a letter dated August 23, 1988 from Dr. C.L. Thompson, Lima's Chief of Staff, to plaintiff confirming that "the Committee members unanimously voted to continue this summary suspension." At paragraph 18 in his summary judgment affidavit, plaintiff claims that, prior to the August 22 hearing, he had not been notified that any specific charges of incompetence had been leveled against him. He further claims that the hearing was not transcribed and he was not allowed to question either Pai or Evans. Further, plaintiff states that he was not permitted to enter the hearing room while Evans and Pai were testifying.

Due to the MSEC's decision to continue plaintiff's suspension, plaintiff requested a hearing before a five-member Ad Hoc Hearing Committee. Article VIII of the hospital's Constitution and Bylaws governs such hospital appellate review. A September 2, 1988 letter from Turner to plaintiff, Plaintiff's Exhibit 15, notified plaintiff that the Ad Hoc Hearing Committee would hold a hearing on September 20, 1988. This letter also notified plaintiff that he was being charged with incompetence and provided specific instances of alleged misdiagnoses. The Ad Hoc Hearing Committee heard testimony for three days. This hearing was transcribed, and defendants Turner and Lima have filed excerpts of the transcript in support of their motion to dismiss. Both plaintiff and defendants have included copies of the Ad Hoc Committee's Report and Recommendation as support for their respective positions. The Committee summed up its examination into plaintiff's alleged incompetence by stating the following.

> While the Committee is concerned with Dr. Manion's inability to correctly read these three slides, we can not determine that he is unfit for his job. This is because there are other factors involved which were brought out in the Hearing; namely, poor communications between pathologists, a desire to please the other pathologists by giving them recognition in importance, a very busy work schedule, and possibly a lack of confidence in the ability to read a slide and make a decision about cancers without backup to the point where he may be handicapped. We therefore recommend that:
>
> (1) Dr. Manion's services be continued with provisional staff privileges until such time that his abilities are satisfactorily demonstrated.
>
> (2) That there be a retrospective review of the work of all the pathologists from July, 1987 to January, 1989.
>
> (3) That a prospective study be done in which all pathologists diagnosis are over-read by an outside independent pathologist not associated with Lima Memorial Hospital. Our pathologists should read and diagnose all of his/her slides independently and submit their diagnosis to the Consultant. After doing so, he/she may request consultation with other Department members, but only first and independent diagnosis will be used to check the accuracy and quality of the diagnosis. Full staff privileges should then be determined by the results.
>
> (4) Until the outside pathologist begin, Dr. Manion's slide work should be over-read.

Report and Recommendation of Lima Memorial Hospital Medical Staff Ad-Hoc Hearings Committee (Report and Recommendation) at 9-10. Plaintiff acknowledges that he was allowed to retain counsel, cross-examine witnesses, and present evidence in his favor in the proceedings be-

fore the Ad Hoc Committee. He also does not attempt to argue that the charges presented to the Committee were in any way different from the charges which Turner notified plaintiff of in the September 2nd letter.

Plaintiff claims that Lima failed to implement the Committee's recommendations when it notified him through the October 17, 1989 letter that it would not make plaintiff an offer for contractually providing pathology services. More importantly, however, plaintiff claims that he is a victim of bad faith peer review. Plaintiff claims that Turner, Pai, and Evans conspired to falsely accuse him of incompetence and, further, that they fabricated evidence and lied to the Committee in order to profit from plaintiff's demise.

Plaintiff's complaint in Case No. 3:90CV7377 contains 16 separate counts against defendants Lima, Turner, Pinnacle Billing Company, Inc. (Pinnacle), Pai, and Evans. Lima and Turner filed a Rule 12(b)(6) motion to dismiss based on their claim of immunity under the Federal Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. §§ 11101-11152 (1991). Though the Court's ruling on Lima and Turner's Rule 12(b)(6) motion might have an impact upon him, Pai has neither joined in nor responded to the motion. As part of his motion for summary judgment, Evans claims immunity under the HCQIA as well. In their motion, Lima and Turner separated plaintiffs' claims into 14 separate theories. Plaintiff has not quarreled with defendants' list of theories, and the Court therefore adopts it. The theories include:

1. Breach of Express and/or Implied Contracts;

2. Deprivation of Substantive and Procedural Due Process;

3. Tortious Interference with Contractual and/or Business Relationships;

4. Tortious Interference with Prospective Contracts;
5. Defamation;
6. Promissory Estoppel;
7. Fraud, Deceit, and Misrepresentation;
8. Tortious Interference with Fiduciary/Contractual/Business Relationships;
9. Federal Antitrust Violations;
10. Illegal Boycott;
11. Unreasonable Restraint of Trade;
12. State Antitrust Violations;
13. Common Law Conspiracy.

In addition, plaintiff has prayed for punitive damages which defendants list as a separate claim.

Though defendants ask this Court to dismiss plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(6), they attach several exhibits to their motion including a copy of the written closing arguments they filed before the Lima Memorial Hospital Medical Staff Ad Hoc Hearing Committee (Committee), a copy of the Report and Recommendation filed by the Committee, and a copy of an order filed by this Court in the case of *William L. Minion, M.D. v. Gregory W. Turner, et al.*, No. C 88-7602 (N.D. Ohio November 7, 1988). Defendants also ask this Court to review the transcript of the proceedings held before the Committee. Finally, defendants cite, as their only case authority for dismissal, the case of *Austin v. McNamara,* 731 F.Supp. 934 (C.D.Cal. 1990), a case resolved under the standard applicable to a Fed. R. Civ. P. 56 motion. The difference between a Rule 12(b)(6) motion and a Rule 56 motion is not unimportant.

> Rule 12(b)(6), permitting a motion to dismiss for failure of the complaint to state a claim on which

> relief can be granted, is substantially the same as the old demurrer for failure of a pleading to state a cause of action. Some courts have held that as the rule *by its terms* refers to statements in the complaint, *extraneous matter on affidavits, depositions or otherwise, may not be introduced in support of the motion, or to resist it.* On the other hand, in many cases the district courts have permitted the introduction of such material.
>
> . . .
>
> The addition at the end of subdivision (b) makes it clear that on a motion under Rule 12(b)(6) extraneous material may not be considered if the court excludes it, but if the court does not exclude such material the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. It will also be observed that if a motion under Rule 12(b)(6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment.

Fed. R. Civ. P. 12 advisory committee's note to 1946 amendment.

Defendants present a confusing argument to the Court by arguing for dismissal on the grounds that plaintiff's complaint fails to state a claim, a motion which confines the Court's inquiry to the pleadings, while relying on matters outside the pleadings as support for their motion. Fortunately, plaintiff has attempted to aid the Court in settling upon a proper standard to use in resolving the instant motion. At footnote 1 in his opposition to defendants' motion, plaintiff states: "There is ample authority that when extraneous materials are appended to a motion to dismiss the District Court may, if it so desires, treat the moving paper as a motion for summary judg-

ment under Rule 56 of the Federal Rules of Civil Procedure. Instantly, as these defendants have attached such materials, the plaintiff feels constrained to file affidavits rather than rest upon the allegations set forth in his complaint." Since it appears to the Court that defendants have argued the instant motion as though it were a motion for summary judgment and since plaintiff has opposed the motion as though it were a motion for summary judgment, the Court will exercise its discretion to not exclude the extraneous materials from consideration. The motion will thus be converted to a Rule 56 motion, as the parties have had ample notice and opportunity to address it as such.

In ruling upon both motions for summary judgment, the Court will apply the following standard.

> Under the Federal Rules of Civil Procedure, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The Supreme Court has recently stated that the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2512 (1986). . . . In reviewing a motion for summary judgment, however, all inferences " 'must be viewed in the light most favorable to the party opposing the motion.' " *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356-57 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Ralph Shrader, Inc. v. Diamond International Corp., 833 F.2d 1210, 1213 (6th Cir. 1987).

The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of

'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which [he] believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The substanttive law of the case identifies which facts are material. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Therefore, only disputes of facts affecting the outcome of the suit under the applicable substantive law will preclude the entry of summary judgment. *Id.* A moving party may discharge its burden "by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex,* 477 U.S. at 324-325. Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson,* 477 U.S. at 250. "[P]laintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor." *Id.* at 257.

Initially, plaintiff claims that summary judgment is not appropriate at this stage of the proceedings because discovery is not yet complete.[2] The thrust of plaintiff's argument is that this lawsuit involves claims of antitrust violations. Plaintiff claims that in this lawsuit "motive and intent play leading roles [and] . . . proof is largely in the hands of the alleged conspirators, and hostile witnesses . . . ." Plaintiff's Brief at 19-20 (quoting *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 472 (1962)). Plaintiff's argument, however, runs contrary to the intent of Congress.

Congress gave a great deal of thought to the impact which the Federal Health Care Quality Improvement Act of 1986 would have on antitrust litigation. In House Report No. 99-903, Congress expressed the following concerns.

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[2] On April 5, 1991, the Court granted defendants' motion to stay all discovery pending resolution of the motions before the Court.

> The reporting system in this legislation would virtually end the ability of incompetent doctors to skip from one jurisdiction to another. The reporting system, however, creates a major problem. Many people in the medical field told the Subcommittee on Health and the Environment that the reporting system would inevitably result in an enormous increase in litigation. The reason: faced with the certainty that they can no longer hide their past records, physicians facing disciplinary action will feel compelled to challenge vigorously any action taken against them. *Based on recent experience, the Committee believes that many of these physicians will file antitrust lawsuits.*
>
> Even though defendants may often win these lawsuits, that may not be sufficient to guarantee enthusiastic, or even minimally adequate, peer review. Unlike other activities that may trigger antitrust lawsuits, properly limited peer review plays no essential or important economic role in the practice of medicine.

H.R.Rep. No. 903, 99th Cong. *reprinted in* 1986 U.S. Code Cong. & Admin.News 6287, 6385 (emphasis added). Congress's view on this topic was further discussed as follows.

> The Committee feels that the purposes of this bill require protection for persons engaging in professional review. Under current state law, most professional review activities are protected by immunity and confidentiality provisions. A small but growing number of recent federal antitrust actions, however, have been used to override those protections. Because the reporting system required under this legislation will most likely increase the volume of such suits, the Committee feels that some immunity for the peer review process is necessary.

> Initially, the Committee considered establishing a very broad protection from suit for professional review actions. In response to concerns that such protection might be abused and serve as a shield for anti-competitive economic actions under the guise of quality controls, however, the Committee restricted the broad protection. As redrafted, the bill now provides protection only from damages in private actions, and only for proper peer review, as defined in the bill.

Id. at 6391. Clearly, Congress was very concerned about drafting the HCQIA in such a way that the HCQIA would encourage physicians to participate in peer review proceedings, shield those physicians from claims of anti-competitive activity, but not enable unscrupulous physicians to use the peer review proceedings as a device to shield anti-competitive activity. To achieve this delicate balance, Congress provided that the participants in the peer review action are immune from a suit for damages once they have demonstrated that the peer review action satisfies the requirements of 42 U.S.C. § 11112(a). The record before the Court is sufficient to enable the Court to determine whether the proceedings held before the Ad Hoc Committees satisfy the requirements in the HCQIA. The Court has before it the deposition or affidavit of each of the principles involved in this lawsuit; these materials include the depositions defendants Turner and Pai, the affidavits of plaintiff and defendant Evans, the depositions of John Weir and Paul Woehlke [3], numerous affidavits from Lima Memorial personnel familiar with plaintiff's work, and numerous affidavits from medical doctors who either reviewed plaintiff's work at Lima Memorial or became familiar with plaintiff's work in some other capacity.

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[3] Mr. Weir was Vice President of Lima Memorial during the period of time at issue in this lawsuit and is currently acting President and Chief Executive Officer of Lima Memorial. Mr. Woehlke was also a Vice President of Lima Memorial during the time at issue.

Since the inquiry the Court must undertake under the HCQIA is essentially objective, the materials before the Court are sufficient to gauge whether the HCQIA's requirements were met.

Though plaintiff has plead 16 counts in his complaint, the relief which plaintiff seeks is primarily in the form of money damages. Section 11111 of 42 U.S.C. provides the following:

> (a) In general
>
> (1) Limitation on damages for professional review actions
>
> If a professional review action (as defined in section 11151(9) of this title) of a professional review body meets all the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section—
>
> (A) the professional review body,
>
> (B) any person acting as a member or staff to the body,
>
> (C) any person under a contract or other formal agreement with the body, and
>
> (D) any person who participates with or assists the body with respect to the action,
>
> shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action. The preceding sentence shall not apply to damages under any law of the United States or any state relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. and the Civil Rights Acts, 42 U.S.C. § 1981 et seq.

> Nothing in this paragraph shall prevent the United States or any Attorney General of a State from bringing an action, including an action under section 4C of the Clayton Act, 15 U.S.C. § 15C where such an action is otherwise authorized.
>
> (2) Protection for those providing information to professional review bodies
>
> Notwithstanding any other provision of law, no person (whether as a witness or otherwise) providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under any law of the United States or of any State (or political subdivision thereof) unless such information is false and the person providing it knew that such information was false.

Defendants contend that both Lima and Turner are immune under subsection (a)(1). As in *Austin v. McNamara*, 731 F.Supp. 934 (C.D.Cal. 1990), the professional review action at issue here must comply with the "due process requirements in 42 U.S.C. § 11112(a) before the review body and the individuals assisting in the process can be granted the immunity from federal antitrust liability that § 11111(a)(1) promises." *Austin*, 731 F. Supp. at 939.

The proceedings which occurred in this case are remarkably similar to the proceedings in *Austin*. In *Austin*, the court found that it was confronted with two separate professional review actions.

> The first one being the meeting of Cottage Hospital's Medical Executive Committee on November 19, 1986 . . ., where the MEC passed a motion to recommend to Cottage Hospital's Board of Directors the Plaintiff's staff privileges be revoked. . . . The

> series of Judicial Review Committee hearings . . . that ran from March 16, 1987 through May 14, 1987 and resulted in the conditional reinstatement of Plaintiff's staff privileges constitutes the second 'professional review action' as defined in § 11151(9).

Austin, 731 F.Supp. at 939. Likewise, this Court finds that it is confronted with two separate review actions. The Court finds that the August 22, 1988 proceedings before the MSEC constitutes a professional review action. Section 11151(9) of 42 U.S.C. yields the definition which Congress provided for the term "professional review action."

> The term "professional review action" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician.

The MSEC voted to continue plaintiff's summary suspension after listening to the testimony of Evans and Pai. At this time, both Evans and Pai admit that they were concerned that plaintiff could be a threat to patient safety. By continuing the summary suspension, the MSEC adversely affected plaintiff's clinical privileges at Lima. Finally, the Constitution and Bylaws at Lima are written in such a way that unless *plaintiff* requested further review of his suspension by the Ad Hoc Committee, the review of his suspension would have ended with the action taken by the MSEC.

Plaintiff challenges defendants' claim that the proceedings before the Ad Hoc Committee constitute a professional review action. Section 11151(9) of 42 U.S.C. goes on to list five types of activities which are expressly de-

fined as not constituting professional review action. Plaintiff claims that subsections B and E of § 11151(9) are applicable, and therefore, the Committee's conduct does not qualify as professional review action. Section 11151 (9)(B) provides that an action may not be considered to be based on the competence or professional conduct of a physician if the action is primarily based on "the physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain business." 42 U.S.C. § 11151(9)(B). Subsection (E) removes the action from the scope of the HCQIA's protection if the action is primarily based on "any other matter that does not relate to the competence or professional conduct of a physician." 42 U.S.C. § 11151(9)(E).

Plaintiff contends that all defendants named in the complaint conspired to restrain plaintiff from practicing his trade. Plaintiff further claims that the conspiracy occurred before, during, and after the purported professional review activity. Paragraphs 96 through 102 in Count XIII of the complaint contain plaintiff's allegations regarding the manner in which defendants conspired to restrain trade. These allegations clearly state a claim upon which relief could be granted, and thus they would pass muster under a Rule 12(b)(6) examination. However, since defendants' motion has been converted to a Rule 56 motion and since defendants have met their burden under that standard by setting forth evidence that the Committee's actions were motivated solely by its concern for the well-being of patients at Lima Memorial, the burden is upon plaintiff to produce evidence that supports his allegation that the Committee was not engaged in a professional review action.

The Court finds that plaintiff has failed to meet his burden here. It is important to note that plaintiff initiated the Ad Hoc Committee's proceedings by requesting review of the MSEC's decision. Such review was his right under Article VIII of the Hospital's Constitution and

Bylaws. Though plaintiff has provided sufficient evidence to challenge the claims of Evans, Pai, and Turner that they were motivated by a concern for patient safety, he has not produced any evidence to challenge the motivation of the Committee itself. In fact, the only evidence before the Court indicates that the Committee was concerned about the quality of pathological services being provided at the hospital. Consequently, the Court finds that the Ad Hoc Committee was engaged in a professional review action.

The defendants can qualify for immunity under the HCQIA if they can demonstrate that:

> A) the professional review actions complied with the standards set forth in 42 U.S.C. § 11112;
>
> B) the results of the professional review actions were properly reported to the State authorities in compliance with 42 U.S.C. §§ 11133, 11151(2);
>
> C) the professional review actions occurred on, or after November 14, 1986, the effective date of the HCQIA.

See *Austin*, 731 F.Supp. at 939.

Both plaintiff and defendants have devoted considerable effort to briefing the issue of whether defendants complied with the standards set forth in 42 U.S.C. § 11112, requirement A above. However, due to the Court's ruling on parts B and C of the test set forth above, the Court finds it unnecessary to engage in an examination of the due process requirement. The professional review actions at issue here occurred after November 14, 1986. Thus, part C of the test is satisfied.

Plaintiff contends that neither the decision of the MSEC nor the decision of the Committee was reported to the appropriate state or federal authorities. Defendants admit this much. Subchapter II of the HCQIA governs the reporting of information related to physi-

cian misconduct. Section 11133 of 42 U.S.C. applies to professional review actions taken by health care entities. This section provides the following.

(a) Reporting by health care entities

(1) On physicians

Each health care entity which—

(A) takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days;

(B) accepts the surrender of clinical privileges of a physician—

(i) while the physician is under investigation by the entity relating to possible incompetence or improper professional conduct, or

(ii) in return for not conducting such an investigation or proceeding, or

(C) in the case of such an entity which is a professional society, takes a professional review action which adversely affects the membership of a physician in the society,

shall report to the Board of Medical Examiners, in accordance with section 11134(a) of this title, the information described in paragraph (3).

. . .

(3) Information to be reported

The information to be reported under this subsection is—

(A) the name of the physician or practitioner involved,

> (B) a description of the acts or omissions or other reasons for the action or, if known, for the surrender, and
>
> (C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

42 U.S.C. § 11133 (1991 Supp.). Section 11134 of 42 U.S.C. provides that:

> The information required to be reported under sections 11131, 11132(a), and 11133 of this title shall be reported regularly (but not less often than monthly) and in such form and manner as the Secretary prescribes. *Such information shall first be required to be reported on a date (not later than one year after November 14, 1986) specified by the Secretary.*

42 U.S.C. § 1134 (emphasis added). "The term 'Board of Medical Examiners' includes a body comparable to such a Board (as determined by the State) with responsibility for the licensing of physicians and also includes a subdivision of such a Board or body." 42 U.S.C. § 11151(2).

Due to the actions of Turner and the MSEC, plaintiff was indefinitely suspended from the practice of medicine at Lima. As mentioned above, had plaintiff not requested review of the MSEC's decision under Article VIII of the hospital's Constitution and Bylaws, he most certainly would have seen his clinical privileges adversely affected for longer than 30 days. Plaintiff also has presented evidence, in the form of his own affidavit, that Turner attempted to plea bargain with plaintiff. Plaintiff testifies that Turner ". . . attempted to coerce a resignation from me in lieu of the filing of formal administrative proceedings." Plaintiff's Affidavit at 24. Given such evidence, the Court concludes that the actions taken against plaintiff by both the MSEC and the Committee were the type

of professional review action which the HCQIA requires health care entites to report to the state Board of Medical Examiners.

Effective March 17, 1987, the State of Ohio had in place legislation governing the reporting of professional review actions.

> (A) Within sixty days after the completion of any formal disciplinary procedure taken by any hospital or ambulatory surgical center against any person holding a valid certificate issued pursuant to this chapter, the chief administrator or executive officer of the facility *shall* report to the board the name of the certificate holder, the action taken by the facility, and a summary of the underlying facts leading to the action taken.
>
> . . .
>
> Prior to release to the board, the summary shall be approved by the peer review committee which reviewed the case or by the governing board of the facility. *As used in this division, "formal disciplinary procedure" means any procedure resulting in the revocation, restriction, reduction, or termination of clinical privileges* for violations of professional ethics, or for reasons of *medical incompetence,* medical malpractice, or drug or alcohol abuse.
>
> . . .
>
> The filing or nonfiling of a report with the board, investigation by the board, or any disciplinary action taken by the board, shall not preclude any action by a health care facility or professional society to suspend, restrict, or revoke the privileges or membership of such physician.

Ohio Rev. Code § 4731.224(A) (Anderson 1987) (1990 Supp.) (emphasis added). The "board" referred to above is the state medical board. Ohio Rev. Code § 4731.01. Since the MSEC and the Committee engaged in profes-

sional review action related to plaintiff's privileges at Lima in 1988 and 1989, and since Ohio had designated in 1987 the entity to which professional review actions should be reported, defendants could have reported the decisions made by the MSEC and the Committee to the Ohio state medical board. Such reporting would have complied with the letter of the HCQUA and the Ohio Revised Code.

The Ohio Revised Code also provides that if an entity complies with the Revised Code's reporting requirements, it may not be sued for damages under Ohio law:

> (H) Any person, health care facility, association, society, or insurer who reports to the board or who refers an impaired practitioner to a treatment provider approved by the board under section 4731.25 of the Revised Code under this section shall not be subject to suit for civil damages as a result of the report, referral, or provision of the information.

Ohio Rev. Code § 4731.224(H) (Anderson 1987) (1990 Supp.). As cited above, the HCQIA provides a broader immunity for health care entities and those individuals who participate in the peer review process. 42 U.S.C. § 11111.

Though the Revised Code provides no explicit penalty for an entity's failure to report, the clear language of § 4731.224(H) indicates that immunity is provided only to those entities that report. Entities that do not report are given no immunity.

The HCQIA, however, explicitly provides for an entity's failure to report professional review action.

> (c) Sanctions
>
> (1) Health care entities
>
> A health care entity that fails substantially to meet the requirement of subsection (a)(1)

> of this section *shall lose* the protections of section 11111(a)(1) of this title if the Secretary publishes the name of the entiy under section 11111(b) of this title.
>
> (2) Board of Medical Examiners
>
> If, after notice of noncompliance and providing an opportunity to correct noncompliance, the Secretary determines that a Board of Medical Examiners has failed to report information in accordance with subsection (b) of this section, the Secretary shall designate another qualified entity for the reporting of information under subsection (b) of this section.

42 U.S.C. § 11133(c). Thus, the HCQIA envisions separate penalties for the failure of entities to report professional review actions. Section 11133(c)(1) provides that the health care entity itself will lose the immunity it is provided under § 11111(a)(1) if it fails to report professional review action to the state medical board. However, the state medical board is also required to report to the Secretary the information provided to it by health care entities. 42 U.S.C. §§ 11133(b), 11134 (b). Should the state medical board fail to report this information, § 11133(c)(2) allows the Secretary to appoint another qualified entity to receive information reported by health care entities.

Deefndants' argument as to why they should not be penalized for not reporting the actions of the MSEC and the Committee is two-fold. They first argue that they had no duty to report the professional review actions taken against plaintiff. However, assuming that they did have such an obligation, defendants go on to argue that their failure to report does not result in a loss of immunity under the HCQIA. The Court finds both arguments unpersuasive.

Addressing defendants' first claim, defendants argue that the reporting requirements of the HCQIA did not apply to health care entities such as Lima until a national data bank was established for the purpose of collecting the reported information. See National Practitioner Data Bank for Adverse Information on Physicians and Other Health Care Practitioners, 54 Fed. Reg. 42722-01 (1989) (to be codified at 45 C.F.R. § 60). This National Practitioner Data Bank opened in 1990; and since the decisions of the MSEC and Committee occurred before the Data Bank opened, defendants claim they had no duty to report.

A review of the regulation which the Secretary proposed at 54 Fed. Reg. 42722-01 reveals that defendants' argument is misguided. The language on which defendants base their argument is as follows:

> The Secretary emphasizes that individuals and entities will not be held responsible for reporting any information under these regulations or the Act until the Data Bank has been established and the Secretary has announced the date of the beginning of its operation in the Federal Register. The reporting requirements are not retroactive from November 14, 1987, the statutory data on which the Data Bank was to have been in operation.

54 Fed. Reg. 42722-01 at 6 (to be reported at 45 C.F.R. § 60.5). Defendants interpret this language as suspending *all* of the reporting required by 42 U.S.C. § 11133. Such a result is inconsistent with the HCQIA's legislative history, and therefore, it could not have been the intent of the Secretary in issuing the regulations. The legislative history of the HCQIA provides the a summary of the HCQIA's reporting requirement.

> Section 203 [42 U.S.C. § 11133]
>
> Health care entities that take actions adversely affecting clinical privileges for 30 days, that accept

privileges during or to avoid an investigation, or that actions adversely affecting professional society membership, *must report* information on such actions *to the Board of Medical Examiners in that state.*

Health care entities permitted to report similar actions respecting practitioners who are not physicians.

Boards of Medical Examiners must in turn report such information to the Secretary or designee.

H.R. Rep. No. 903, 99th Cong. *reprinted in* 1986 U.S. Code Cong. & Admin.News 6287, 6389-90 (emphasis added). In the House Committee's discussion of the HCQIA, the Court finds the following insight.

> Subsection (b) [42 U.S.C. § 11112(b)] bars immunity for health care entities that do not participate fully in the reporting requirements of section 203(a). The approach used in this legislation reflects the Committee's *strong feeling* that the current problem of incompetent or unprofessional physicians being able to disappear and leave their history behind must end. This problem can be solved only if hospitals and other health care entities make their findings available to each other through the reporting systems established in this legislation.
>
> Simply conducting professional review to rid a single hospital or a single community of a problem physician without reporting the action is not sufficient to warrant the protection provided under this legislation. *Accordingly, health care entities that do not report do not get immunity under this bill.*

Id. at 6392 (emphasis added). Congress was absolutely clear in expressing its intention that health care entities which fail to report physicians whom they feel are incompetent do not get the protection provided in § 11112 of the HCQIA. Today, defendants attempt to do that

which Congress expressly forbid: reap the benefit of the HCQIA without complying with its reporting requirements. Defendants advance no argument that they relied on the language quoted above from the Federal Register. Indeed, as the Secretary did not publish the proposed regulations until October 17, 1989 and defendants concede that the actions taken regarding plaintiff occurred on or before August, 1988, Defendants' Reply at 8, defendants could not have relied on the proposed regulations.

Health care entities are not required to report information to the National Data Bank; they are required only to report professional review actions to the state medical board. 42 U.S.C. § 11133(a)(1). It is the responsibility of the state medical board to report to the National Data Bank. 42 U.S.C. §§ 11133(b), 11134 (b). As the Court mentioned above, there appears to be no reason why defendants could not have reported the actions of the MSEC and the Committee to the Ohio medical board. Therefore, though the Secretary may have intended to excuse state Boards of Medical Examiners like the Ohio board from the reporting requirements in §§ 11133(b), and 11134(b), the Secretary could not have intended to exempt health care entities like Lima from reporting the results of professional review actions to the state board. Having found no evidence that either the MSEC or the Committee reported their findings to the Ohio medical board and having seen no argument advanced by defendants which could provide a valid excuse for their failure to report, the Court finds that both Lima and Turner have lost the immunity they would otherwise be entitled to under 42 U.S.C. § 11111 (a). The loss of immunity for a failure to report is unavoidable given the language in 42 U.S.C. § 11133(c). Defendants Turner and Lima's motion to dismiss will thus be denied.

Having found that defendants Turner and Lima are not immune from suit, the Court will now address de-

fendant Evans' motion for summary judgment filed in Case No. 3:89CV7436. The Court turns first to Evans' claim that, as a participant in the professional review action, he is immune from suit under subsection (a)(2) of 42 U.S.C. § 11111. This subsection was quoted above in its entirety. Plaintiff contends that the HCQIA does not provide Evans with immunity because, pursuant to the last clause in 42 U.S.C. § 11111(a)(2), Evans provided information which was false and Evans knew that the information which he was providing was false. While defendant contends that the remarks he made about plaintiff's skills as a pathologist were true and motivated solely by Evans' concern for patient safety, plaintiff claims that defendant made untrue, unsolicited misrepresentations with the ulterior motives of obtaining economic advantage and power in the Pathology Department.

At the heart of the issue is plaintiff's contention that "Dr. Evans misrepresented a request for consultation as a final diagnosis and, when that was insufficient to remove Dr. Manion, went further and stated that he [plaintiff] was dangerous, shoked a global ignorance of pathology, and was untrainable." (Plaintiff's Opposition at 18.) The alleged misrepresented request for a consultation regards the incident involving the two prostate cases mentioned earlier. Plaintiff's Opposition to Defendant's Motion for Summary Judgment at 18. Evans' affidavit reveals the following:

> 19. Mr. Woelke, Dr. Pai and I met with Mr. Turner and related to him the specifics of the incident involving the prostate slides, our observations generally and the nature of our concerns. When asked by Mr. Turner if I believed that Dr. Manion posed a threat to the patients of the hospital, I indicated that I believed that he did, that I felt he was dangerous and that patients could be hurt.
>
> . . .

21. I shortly thereafter was advised by Mr. Turner that he had suspended Dr. Manion. I am aware that, thereafter, Dr. Manion's suspension was upheld by the hospital's administrative appeal process and that Dr. Manion requested a review by an Ad Hoc Committee pursuant to the hospital constitution and by-laws. I appeared before the Ad Hoc Committee and gave testimony on November 7, 1988.

. . .

23. I continued to attempt to negotiate a written employment contract with Lima Memorial Hospital from October, 1988 through January, 1990. The hospital ultimately offered me a contract form but it included provisions to which I could not agree, including a dismissal without cause and automatic forfeiture of privileges on dismissal.

24. . . . I was neither offered nor promised anything, including a continued position with the hospital, in connection with my testimony before the Ad Hoc Committee.

25. It was my understanding that I would be retained by Lima Memorial Hosptial as a staff associate pathologist and that someone else, most likely Dr. Manion, would ultimately be formally appointed the chairman of that department. I was never offered, nor did I ever seek, that position or even discuss the matter with anyone at Lima Memorial Hospital. Even after Dr. Manion's privileges were suspended, I did not serve as acting head of the department. Dr. Pai served in that capacity.

26. At all times when I spoke with appropriate administration officers of Lima Memorial Hospital, or before the Ad Hoc Committee, my concern was for the health and safety of the patients of Lima Memorial Hospital.

Affidavit of George A. Evans at 19, 21, 23, 24, 25, and 26. With the above recital, defendant has met his burden under the summary judgment standard, as he has produced evidence that he provided information which he believed to be true to a legitimate peer review committee for the purpose of protecting the health and safety of hospital patients. The burden thus rests with plaintiff to produce evidence creating a genuine issue of material fact regarding defendant's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Plaintiff responded by filing the affidavits of twelve individuals, including his own affidavit. The Court once again quotes, at length, from plaintiff's affidavit.

> 18. In order to further my professional demise at Lima Memorial Hospital, Mr. Turner recruited Dr. Pai and Dr. Evans to make certain false allegations against me concerning my competency as a pathologist.
>
> 19. The reasons that Doctors Pai and Evans participated in this conspiracy was to eliminate me as a partner, shareholder and employer providing professional pathology services to Lima Memorial Hospital. Further, Doctors Pai and Evans attempted not only immediate financial gain but to eliminate me as a potential competitor in the Lima, Ohio region. Doctors Evans and Pai would thereby substantially increase their income and were able themselves to become "rotating Chairpersons of the Department of Pathology." I was not in favor of a rotating Chairmanship. I was not in favor of granting Dr. Evans shareholder status in his first year working with me until I had evaluated him professionally and personally. He was, therefore, an employee of the professional entity of Dr. Pai and me.
>
> . . .
>
> 21. Indeed, in exchange for the bad faith, false and malicious testimony of Doctors Pai and Evans

> regarding my competency as a physician and pathologist, they were immediately compensated with long-term written contracts. Prior to their bad faith, false and malicious testimony, Doctors Pai and Evans had no formal written contracts with Lima Memorial Hospital.

Affidavit of William L. Manion at 18, 19, and 21. Supporting many of these allegations, plaintiff filed the affidavits of several current and former Lima employees.

George Stevens, Chief Financial Officer at Lima from 1984 until March 6, 1989, states that "Dr. Evans had interviewed for Dr. Manion's position as Chairman of Pathology in 1986 but was unable to take the position in July of 1987 as he had one year of training to complete." Affidavit of George Stevens at 14. He goes on to add the following.

> I understand that the hospital administration would not consider Dr. Shobha Pai for the position of Chairman of Pathology and that Dr. Evans was informed of this as well. Only Dr. Manion and Dr. Evans remained to be considered as Chairman of Pathology. As Chief Financial Officer, I interacted with Dr. Evans in several administrative areas. Our department, which included the hospital computer system, scheduled presentations by computer vendors of laboratory hardware with Dr. Evans. Previous to this, we had scheduled such presentations with Dr. Manion, Chairman of Pathology. Dr. Evans made decisions with respect to the delivery of billing information from our hospital computer to himself and Dr. Pai. Previous to that, Dr. Manion had asked that the billing information be provided to Pinnacle Billing Company, Inc. . . . As Dr. Evans was making decisions regarding the purchase of computer equipment for the Pathology Department, and was making decisions regarding billing information, and was making decisions involving

> a potential billing relationship with Pinnacle Billing, it appeared to me that Dr. Evans was functioning as acting Chairman of Pathology.

Stevens Affidavit at 19, 20, 21, 22, 24. Gregory Krisher, a Certified Medical Technologist employed by Lima from 1987 to present, states that "[f]rom the way Dr. Evans was ordering laboratory workers, and making laboratory decisions, it was my impression that Dr. Evans was the Acting Chairman of the Pathology Department." Krisher Affidavit at 21. Vicki Lear, a laboratory technician employed by Lima from 1985 to present, states that "[a]fter Dr. Manion was suspended I observed Dr. Evans taking on many of the decision making responsibilities Dr. Manion had performed as Chairman before being suspended." Lear Affidavit at 5. Ms. Lear adds that "[a]t [Dr. Evans' going away party] I recall Dr. Evans stating that the Hospital had given him a contract offer after he had testified against Dr. Manion. Dr. Evans stated that a few minutes after he had testified for a number of hours against Dr. Manion, he was called down to the Administrative Offices and given a contract." *Id.* at 7. Karl Zalar, Director of Human Resources at Lima from December of 1988 until July of 1989, states that "[a]fter Dr. Manion was suspended, Dr. Evans took the responsibility for administrative matters which Dr. Manion had formerly handled. . . . From the way Dr. Evans was making administrative decisions and communicating with our Department, it was my impression that he was the Acting Chairman of Pathology."

Based on the testimony in the affidavits listed above, the Court finds that plaintiff has raised a genuine issue of material fact regarding defendant's motivation for testifying against him. A reasonable trier of fact, after listening to the above testimony, could rationally conclude that Dr. Evans interviewed for the position of Chairman of the Pathology Department but could not obtain the position. A jury could further conclude that

Dr. Evans was motivated to testify against plaintiff by a desire to remove plaintiff from the position for which defendant had interviewed so that defendant could ascend to that position. Finally, a jury could conclude that defendant was rewarded for his efforts, as the hospital offered him a contract at a time when defendant was functioning as the de facto Chairman of Pathology.

The Court now proceeds to examine whether defendant uttered false statements against plaintiff with knowledge of their falsity. The focus of plaintiff's attack here is the incident surrounding the prostate slides. Plaintiff's argument is best described by paragraph 9 of his affidavit in opposition to defendant's motion for summary judgment.

> In order to test Dr. Evans and direct his pathology analysis, I would write on a post-it note the clinical diagnosis. I would later learn that the dozens of notes I had written to Dr. Evans regarding clinical diagnosis or diagnosis of exclusion would eventually be described by him as my final pathology diagnosis ready to be transmitted to the patient's chart. Dr. Evans maintains that I had a "seeming lack of concern over misdiagnosis." In fact, Dr. Evans is well aware that these so-called "misdiagnosis" were preliminary clinical diagnosis by the attending physician and were not final pathology diagnoses . . . In the interest of improving this skill and evaluating the skill of Dr. Evans I requested intradepartmental consultation on two prostate cases.

Manion Affidavit at 9. In a somewhat technical argument, plaintiff goes on to claim that he altered his normal clinical criteria for diagnosing prostate cancer to accommodate a criterion employed by defendant. Plaintiff claims that the criterion defendant had discussed with plaintiff involved the detection of "a single layer of epithelium" as denoting prostate cancer. Plaintiff states that, in Case No. S88-4161, defendant diagnosed the patient

as suffering from prostate cancer because of the presence of "glands lined by a single layer of epithelium." Plaintiff offers Exhibit 6 to his affidavit as the documentation in that case. This exhibit is a copy of the report issued by Dr. Evans in that case, and it does contain a diagnosis of prostate cancer signed by Dr. Evans wherein he explains his diagnosis by mentioning "glands lined by a single layer of epithelium."

Plaintiff claims that in Case No. S88-4199 and S88-4202, he altered his normal diagnostic technique in an attempt to apply defendant's criterion of "a single layer of epithelium. Plaintiff discovered what he believed to be glands that were lined by a single layer of epithelium and went to see defendant to compare diagnoses. As defendant was busy, plaintiff left the two cases with defendant with two handwritten notes in an effort to obtain a consultation. The two handwritten notes stated "George, I dictated this as focal (early) prostate concer. Please sign the dictation for me if you agree." Plaintiff's Exhibits 7 and 8. Plaintiff states that "[t]hese handwritten notes are representative of intradepartmental consultations between pathologists. "I asked him [Evans] to specifically examine the cases as I was attempting to correctly understand and apply the criterion of a single layer of epithelium in the diagnosis of concer." Plaintiff's Affidavit at 12. Plaintiff offers Exhibits 9 and 10 as the transcribed dictated reports provided to defendant in the two cases where plaintiff was requesting an intradepartmental consultation. In each of these dictations, plaintiff gives the description of a single layer of epithelial cells as the basis for his diagnosis. In contrast, plaintiff further offers Exhibit 11 as an example of his usual criterion for diagnosing cancer: "pleomorphic hyperchromatic nuclei."

Plaintiff claims that defendant misrepresented plaintiff's diagnoses in Case Nos. S88-4199 and S88-4202 to Pai and Woehlke. Plaintiff claims that defendant told those individuals that plaintiff's diagnoses were plaintiff's

final diagnoses instead of what defendant knew them to be: a request for intra-departmental consultation. Further, plaintiff claims that defendant made the same deliberate misrepresentation to the Ad Hoc Committee.

Plaintiff offers the affidavit of Dr. Harry A. Schwamm to support his claims. Dr. Schwamm states that he is familiar with plaintiff's custom and practice as a pathologist. Dr. Schwamm states that "[i]t is the usual practice for residents in pathology to use preliminary working notes. Dr. Manion used commercially available 'post-it' notes." Schwamm Affidavit at 9. Dr. Schwamm states the following as well.

> The use of intra-departmental consultation in this fashion is a widespread practice, and indeed, documentation of the practice is demanded by Quality Assurance Programs of the College of American Pathologists and Joint Commission on Accreditation of Healthcare Organizations.
>
> In the situation described in the previous paragraph for one to attribute a preliminary "post-it" note to be the final histopathologic diagnosis ready for the patient's chart is inappropriate and fradulent.

Schwamm Affidavit at 11, 12.

At his deposition, Paul Woehlke was questioned by plaintiff's attorney, Arnold Bunge, and testifies to the following.

> Q. When you met with Evans and Pai on July 28th, 29th, whatever it was there, did Evans mention any specific cases to you at that time?
>
> A. There was one case that was mentioned that they expressed concern over, yes.
>
> Q. Was that a prostate case?
>
> A. Yes.
>
> . . .

Q. What did he [Evans] tell you about the incident, as near as you can recall?

A. Apparently there was a case of prostatic surgery that was done, and Dr. Manion read the slides, put the records on Dr. Evans' desk and said sign this over and send it out, and the case was indicated that it was malignant tissue and I believe Dr. Evans was concerned with doing something that he had not read the slides on so he reviewed the slides and read it as benign before he was to sign any report.

Q. Did he exhibit to you the note which he indicated or claimed that Dr. Manion had written?

A. No, I didn't recall seeing anything.

Q. This was all just oral, there weren't any papers involved at all in this discussion?

A. I didn't see any papers.

Q. No copies of the records?

A. No.

Q. It was all just all verbal reports or oral reports from Evans and Pai about Dr. Manion?

A. That's correct.

Woehlke Deposition at 41-43. After reviewing Woehlke's testimony, Dr. Schwamm states the following.

> This testimony reveals to me that Dr. Evans knowingly misrepresented several aspects of this incident. Dr. Evans did not reveal to Mr. Woehlke that Dr. Manion had specifically requested Evans *in writing to review* the slides before signing them. Next, Dr. Evans told Mr. Woehlke that he (Dr. Evans) was concerned about signing reports on slides he had not read so he decided, as if it were *upon his own initiative,* to review the slides. I read

> this as Dr. Evans stating Manion had simply asked Dr. Evans to "initial" the case without examining the slides. This is not true.

Schwamm Affidavit at 23. Earlier, Dr. Schwamm discloses that "[t]he verbal request from a fellow pathologist to 'initial' a report is far different from the written request to 'Please sign the dictation for me if you agree with the dictation. . . .' The former request is routine and a request to expedite the transmission of the report to the patient's chart. The latter request is a request for intra-departmental consultation." Schwamm Affidavit at 19.

Plaintiff has offered sufficient evidence to raise a triable issue of fact regarding defendant's statements to Pai, Woehlke, Turner, and the Ad Hoc Committee. The facts surrounding what defendant told Pai, Woehlke, Turner, and the Ad Hoc Committee are of a technical nature as they involve physician shorthand. Therefore, the testimony of Dr. Schwamm could prove helpful to a trier of fact in sorting out what the shorthand means. If the jury believes Dr. Schwamm and further, if the jury believes plaintiff's recitation of the facts, it could reasonably conclude that defendant deliberately misrepresented the facts surrounding the prostate slides. Should this be the case, defendant looses all immunity under the HCQIA.

Defendant Evans has moved for summary judgment on plaintiff's claims for defamation and interference with contract. Defendant argues the doctrine of qualified immunity as his basis for dismissal. In addition to the immunity under the HCQIA, defendant claims a qualified privilege for defamation under *Hahn v. Kotten,* 43 Ohio St.2d 237 (1975), qualified privilege for interference with contract under *Smith v. Klein,* 23 Ohio App.3d 146 (Ohio App. 1985), qualified privilege for participating in a bona fide peer review proceeding under Ohio Rev. Code § 2305.25(A), and qualified privilege pursuant to

the Lima Memorial Hospital Constitution and Bylaws. Each of the these privileges requires a showing that the person uttering the defamatory words acted in good faith and/or without malice. The Court applies its findings above to all defendant's claims for qualified immunity. Hence, defendant is not entitled to summary judgment on any of the claims plaintiff has brought against him.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendants Lima and Turner's motion for summary judgment be, and hereby is, DENIED; and it is

FURTHER ORDERED that defendant Evans' motion for summary judgment be, and hereby is, DENIED.

/s/ John W. Potter
United States District Judge

Supreme Court, U.S.
FILED
JUN 24 1993
OFFICE OF THE CLERK

(2)

No. 92-1878

In The

Supreme Court of the United States

October Term, 1992

LIMA MEMORIAL HOSPITAL AND GREGORY TURNER,

Petitioners,

v.

WILLIAM L. MANION, M.D.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit's holding, that the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. § 11101 *et seq.*, grants to hospitals and physician peer reviewers immunity from damages and not from suit, comports with this Court's characterization of such immunity in *Summit Health Ltd. v. Pinhas*, 111 S. Ct. 1842 (1991) and with congressional intent.

2. Whether a district court's denial of a motion for summary judgment based on HCQIA immunity is immediately appealable under the collateral order doctrine.

3. Whether the Sixth Circuit's decision that the denial of a motion for summary judgment based on HCQIA immunity is not immediately appealable conflicts with the Tenth Circuit's decision in *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992).

PARTIES TO THE PROCEEDING

Respondent wishes to bring to the attention of this Court that petitioners have first failed to identify all parties to the proceeding. Pinnacle Billing Company, Inc., a private billing company formerly owned by defendant, Gregory Turner, is also a defendant in this action. Petitioners have also mistakenly identified defendant Shobha Pai, M.D. as being a co-defendant with Dr. George Evans in Dr. Manion's first action initiated in July of 1989. In fact, Shobha Pai was a co-defendant with Gregory Turner, Lima Memorial Hospital and Pinnacle Billing Company only in a second action brought in July of 1990. Later, both actions were consolidated following cross claims by Pinnacle Billing Company and Dr. George Evans against Gregory Turner and cross claims by Dr. George Evans against Lima Memorial Hospital, Dr. Shobha Pai and Pinnacle Billing Company. Dr. Manion has not filed suit against any physician committee member because he believed that the committee members were presented with perjured testimony.

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No. 92-1878

In The

Supreme Court of the United States

October Term, 1992

LIMA MEMORIAL HOSPITAL AND
GREGORY TURNER,

Petitioners,

v.

WILLIAM L. MANION, M.D.,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION

Respondent, William L. Manion, M.D., by and through his attorney of record, hereby submits his brief in opposition to the petition for the writ of certiorari.

STATEMENT OF THE CASE

This case arose because Petitioners, Lima Memorial Hospital and hospital President, Gregory W. Turner, summarily suspended Dr. Manion from practicing pathology and acting as Chairman of the Department of Pathology at Lima Memorial Hospital. Mr. Turner is not a physician

and relied upon no medical recommendation for suspension. The unjustified suspension was initiated in an effort to force Dr. Manion to resign his position at Lima. The issues before this Court for review arose as a result of a denial of a Motion for Summary Judgment by the United States District Court for the Northern District of Ohio, Western Division. Contrary to the very short statement of facts contained in the Petitioners' Brief, that court had before it extensive affidavits, depositions, and various other forms of documentary evidence demonstrating anticompetitive and bad faith motives of petitioners. Substantial disputes of fact existed and still exist in this matter. Those disputes concern the initial and subsequent conduct surrounding Dr. Manion's suspension, its review by various hospital committees, and his subsequent sham reinstatement to practice pathology and serve as Chairman of that Department.

The Petitioners would have this Court understand that Dr. Manion's suspension was handled as a matter of routine procedure with full notice, opportunity to confront witnesses, and due process protection. That is not the case. Dr. Manion presented evidence to the District Court, that if believed by a jury, would show that he had initiated plans to set up an outpatient pathology lab which Mr. Turner opposed because it would compete with the Hospital's own laboratory service. Mr. Turner also opposed this measure because he collected substantial revenues of over $300,000 per year from the radiology and pathology departments at Lima through his private billing company, Pinnacle Billing Service, Inc. Mr. Turner believed that Dr. Manion would establish his own billing service to collect revenues for his private laboratory and

professional services, thus eliminating Mr. Turner's lucrative billing arrangement.

After he became aware of Dr. Manion's plans, Mr. Turner suspended Dr. Manion on August 3, 1988, initially claiming that Dr. Manion's colleagues, Drs. Pai and Evans, would not recommend him for advancement to active staff. In fact, Drs. Pai and Evans conspired with Mr. Turner and agreed to support Turner to coerce Dr. Manion's resignation in exchange for lucrative hospital contracts and Dr. Manion's chairmanship. It is undisputed that Mr. Turner offered Dr. Evans an employment contract shortly after Dr. Evans testified against Dr. Manion before the peer review committee. Dr. Evans claims that a private Pinnacle Billing contract was also presented to him with his hospital employment contract.

Mr. Turner initiated the suspension on August 3, 1988 but made no attempt to report it to the State Medical Board. At no time throughout all of the proceedings followed at Lima Memorial Hospital, did any hospital representative make any attempt to notify the Ohio State Medical Board that Dr. Manion's privileges had been suspended. In fact, Dr. Manion brought to the District Court evidence that Mr. Turner repeatedly attempted to bargain his suspension into a resignation from the Hospital in exchange for a recommendation letter. When Dr. Manion refused to resign, Mr. Turner and co-defendants orchestrated a series of so-called peer review proceedings designed to get rid of him. Congress in the HCQIA specifically sought to eliminate such a secret resignation by a physician given in exchange for promises by the hospital not to disclose that the physician was under investigation for possible incompetence. *See* 42 U.S.C. §§ 11111(b) and

11133(a)(1)(B). Ironically, these petitioners now seek immunity under the very Act which they tried to subvert by offers of nondisclosure and non-reporting.

Right after Mr. Turner's initial notice of suspension, Dr. Pai, Dr. Manion's business partner, dissolved her business relationship with him. She was not required to take this action by either their partnership agreement or their proposed corporate documents. This would allow Pai and Evans to form a new business entity for the provision of laboratory services. Consequently, Dr. Manion presented substantial evidence to the District Court of an economic or business motive for the allegations made against him.

The evidence presented to the District Court also showed that one of the early peer review proceedings was a meeting of the Medical Staff Executive Committee of Lima Memorial Hospital, about which Dr. Manion received no notice of charges and was denied the right to confront or cross examine any witnesses. No transcript was made of the secret proceedings and alleged testimony. The Executive Committee then affirmed the summary suspension and Dr. Manion, still refusing to resign, requested a hearing. This time he asked that he be informed of the charges and be given a chance to confront his accusers.

Only after Dr. Manion made this request did Mr. Turner, Dr. Pai, Dr. Evans and their agents search through pathology files and meet with personnel in order to create charges which could somehow justify the suspension before the Hospital's Ad Hoc Review Committee. Again, no attempt was made to inform the Ohio State Medical

Board that Dr. Manion's summary suspension had been sustained by the Medical Staff Executive Committee.

Contrary to the Petitioners' allegations, Dr. Manion did challenge the procedures and attacked the information furnished to the Ad Hoc Review Committee. Specifically, he provided the affidavits of both of the Hospital's *own* outside consultants, Dr. Michael Clark and Dr. Frank Reale, who were brought in to testify *against* Dr. Manion. In his affidavit, Dr Clark stated:

> I have very serious questions about just what was submitted for my review since there seemed to be two versions of these reports. . . . If I was given reports Dr. Manion never signed out, or never diagnosed, then he is a victim of fraud and bad faith peer review. As I was not given reports that Dr. Manion had signed, I suspect he is a victim of fraud and bad faith peer review.

(Clark affidavit at p. 2-3).

The District Court also received testimony and other admissible evidence that Lima Memorial Hospital and Mr. Turner never intended to abide by the recommendations of its own Ad Hoc Review Committee. In fact, a replacement pathologist for Dr. Manion was signed to a contract long before the end of Dr. Manion's appeals. The hearing committee recommended that Dr. Manion be reinstated, subject to minor monitoring restrictions, as Chairman of the Department of Pathology. The same monitoring restrictions were imposed upon Dr. Manion's accusers, Drs. Pai and Evans, after evidence of their substantial error rate was presented by Dr. Manion to the review committee. Falsely claiming adherence to the committee's recommendations, the hospital reinstated Dr.

Manion's privileges but he was instructed not to set foot inside the hospital. He was then informed that his contract with the hospital had expired months *before* the initiation of the peer review hearings. This exclusion from the hospital facility made his hospital privileges meaningless, and were imposed even after Dr. Manion fully accepted the minor review restrictions placed upon him and his colleagues by the Ad Hoc Review Committee. Finally, Dr. Manion presented to the District Court over thirty staff physicians at Lima who had either testified or wrote strong letters in Dr. Manion's support attesting to his competence and dedication. (Opposition Motion at Exhibit A). All of this evidence suggested to the District Court that the entire proceeding had been a sham.

Faced with substantive and extensive disputes of fact, the District Court, employing an objective analysis, denied the Petitioners' Motion for Summary Judgment and held that

> [a] factual issue does exist as to whether Lima and Turner initiated the peer review proceeding with a reasonable view to further quality health care as required under 42 U.S.C. 11112(a). Also, whether or not this case does in fact grow out of testimony or recommendations taken during a peer review proceeding or whether it stems from a variety of separate events and conduct which resulted in the institution of peer review proceeding presents a factual issue.

(Petitioners' Appendix C at 18a).

The District Court also found, under an objective analysis, that Dr. Manion had presented sufficient evidence to question the truthfulness and motives of Dr.

Evans and denied Dr. Evans' motion for summary judgment under the HCQIA. (Petitio*ners' appendix D at 54a).* Petitioners' repeated claims that the District Court did not apply an objective standard is, in fact, contradicted by the District Court opinion: "the inquiry the Court must undertake under the HCQIA is *essentially objective. . . .* " (Petitioners' Appendix D 32a) (emphasis added)

In their appeal to the Sixth Circuit Court of Appeals, petitioners claimed that the district court applied an improper legal standard, that immunity under the HCQIA also applied to state law claims, and that the denial of a motion to dismiss and/or summary judgment based on the qualified immunity provided in the HCQIA is immediately appealable under the collateral order doctrine. Argument was heard on December 2, 1992. The Court of Appeals rendered an opinion on February 26, 1993 dismissing the appeal and holding that the HCQIA does not confer a right not to stand trial, and that the district court's order denying summary judgment is not immediately appealable.

ARGUMENT

I. THE SIXTH CIRCUIT'S HOLDING THAT THE HCQIA PROVIDES HOSPITALS AND PHYSICIAN PEER REVIEWERS IMMUNITY FROM DAMAGES AND NOT FROM SUIT COMPORTS WITH EXISTING CASE INTERPRETATIONS OF THE ACT.

The Sixth Circuit's decision conforms with other case interpretations of the HCQIA. For example, in *Decker v. IHC Hospitals, Inc.*, 982 F.2d 433 (10th Cir. 1993), the Tenth

Circuit Court of Appeals dismissed the defendant hospital's appeal of a denied motion to dismiss as premature. The *Decker* court stated that "[t]he HCQIA establishes an immunity from liability only – the plain meaning . . . is that professional review bodies and covered individuals who satisfy the requirements of § 11112(a) are immune from liability only. On its face, this provision does not explicitly establish immunity from suit." *Id.* at 436. Clearly, *Decker's* holding and rationale is completely consistent with the decision of the Sixth Circuit Court in this case.

In an argument to justify certiorari, Petitioners attempt to fabricate a conflict between the Sixth Circuit's holding and the Supreme Court case of *Summit Health Ltd. v. Pinhas*, 111 S.Ct. 1842 (1991). On page eight of their brief, petitioners claim this Court suggested, in a brief footnote to *Pinhas*, that the HCQIA provides immunity from suit, not damages. Aside from simply quoting this footnote, petitioners fail to support their conclusory interpretation of *Pinhas* with solid argument. Surely petitioners must realize that the *Pinhas* footnote was merely dictum in a case concerning the entirely separate issue of whether a physicians's allegations of an anti-competitive conspiracy constituted a nexus with interstate commerce sufficient for federal jurisdiction. *Id.* at 1848-49 & n.12.

Issues concerning the HCQIA, and in particular interpretation of whether the Act provides immunity from suit or damages, were at best collateral to the main questions in *Pinhas*. The Court was simply not called on to issue an informed interpretation of the HCQIA. However, in the interest of fairness and completeness, the remainder of the footnote stated: "[t]he immunity provisions [were] restricted so as not to protect illegitimate actions taken

under the guise of furthering quality health care. Actions . . . that are really taken for anti-competitive purposes will not be protected under this bill. *See* 132 Cong. Rec. H9957 (Oct. 14, 1986) (Remarks of Rep. Waxman)." *Id.* at 1848 n.12. Thus, if this footnote carries any weight whatsoever in interpreting the HCQIA, it must be that bad faith and anti-competitive purpose are necessary considerations of analysis under the standards of 11112(a).

Contrary to petitioners' assertions, the opinions in this case and *Decker, supra,* do not conflict with *Austin v. McNamara,* 979 F.2d 728 (9th Cir. 1992). In truth, this case and *Austin* are not comparable. Here, the Sixth Circuit dismissed petitioners' appeal as premature, because it concluded the Act only conferred protection from damages and not immunity from suit. In doing so, the *Manion* appellate court did not evaluate the application or consideration of evidence to rebut the presumptions of § 11112(a) as had been addressed in *Austin.*

To the contrary, in *Austin,* the district court *granted* summary judgement for the defendant and the plaintiff-neurosurgeon appealed. The *Austin* appellate court was specifically called on to interpret application of the legal standard for rebutting the presumptions of the Act. The court concluded that summary judgement must stand because the plaintiff Dr. Austin had produced insufficient evidence to rebut the presumptions. *Austin* involved an appeal from a district court *granting* summary judgement, which is clearly a *final* order since it disposes of the case. Conversely, *Manion* involved the dismissal of an appeal of a district court *denying* summary judgement, which is clearly an *interlocutory* order not ripe for appeal. Not only

are the facts of each case significantly different, but the legal issues themselves differ and thus there can be no conflict between the cases.

Petitioners cite *Fobbs v. Holy Cross Health System Corp.*, 789 F. Supp. 1054 (E.D. Cal. 1992) for the proposition that a court may rule on whether a physician has rebutted the presumptions favoring a peer review proceeding under the HCQIA at an early stage of the litigation. *Fobbs* cannot be compared with the Sixth Circuit Court of Appeals decision in this case since the Sixth Circuit dealt with an interlocutory appeal of the denial of a motion for summary judgement. The two courts cannot be compared because the *district court* in *Fobbs* granted a motion for summary judgement on its facts. The determination of whether a physician can rebut the presumption under the HCQIA must be determined on the facts of the case at issue. Similarly, a court could decide that the physician had rebutted the presumptions that the standards of the HCQIA were not met or that a dispute of fact existed as to whether they were met. *See, e.g., Islami v. Covenant Medical Center, Inc.*, 1992 WL 480983 (N.D. Iowa) at 18. Here no conflict exists between *Manion* and *Fobbs* because the facts and issues of law are substantially different.

Finally, petitioners' claims that the HCQIA standards can cloak unjustified, bad faith, anticompetitive peer review, under an objective standard, is not supported by the article Petitioners cite at p. 20 as "[a]n excellent analysis of the Act's legislative history and objectives." (Petition for Writ of Certiorari at 20, n.4) The article concludes that "[u]nless a physician can overcome this presumption and demonstrate that a peer review action

stemmed from *anticompetitive or other improper motives*, he or she will be barred from collecting damages. *See* Adler, Robert S., *Stalking the Rogue Physician: An Analysis of the Health Care Quality Improvement Act*, 28 Am. Bus. L. J. 722 (1991) (emphasis added).

II. THE SIXTH CIRCUIT'S HOLDING THAT THE HCQIA GRANTS HOSPITALS AND PHYSICIAN PEER REVIEWERS IMMUNITY FROM DAMAGES AND NOT FROM SUIT COMPORTS WITH CONGRESSIONAL INTENT

The Sixth Circuit's holding completely agrees with *final* congressional intent as demonstrated by the legislative history and actual text of the Act. Most importantly, the language of the Act itself explicitly states that peer review participants "shall not be *liable in damages*" 42 U.S.C. § 11111(a)(1) (emphasis added). In no way does the Act label its protection "immunity from suit" *Id.* As the Sixth Circuit carefully noted, an earlier version of the Act did, in fact, appear to extend protection to immunity from suit, but that version was revised and restricted to reflect the current protections. *See* H.R. 5110, 99th Cong. 2d. Sess. 1986, *reprinted in The Health Care Quality Improvement Act of 1986: A Legislative History* at 196 (Bernard D. Reams ed. 1990). In explaining the revision, the legislative committee stated that such broad "protection might be abused and serve as a shield for anti-competitive economic actions under the guise of quality control. . . . " *See* H.R. Rep. No. 99-903, 99th Cong., 2d Sess. 3, (1986), *reprinted in* 1986 U.S. Code. Cong. & Admin. News 6384, 6384-91. By citing views which were debated but later discarded, petitioners simply misrepresent congressional

intent by claiming the deleted portions of the Act embody genuine congressional purpose.

Even the Act's initial congressional findings, which embody the impetus for enactment of the HCQIA, explicitly state that "the threat of private money damage liability . . . unreasonably discourages physicians from participating in effective peer review" 42 U.S.C. § 11101(4). Obviously, there is no mention of the threat of litigation which would support construing the act as providing immunity from suit.

Further evidence that congress intended protection from damages and not immunity from suit is shown by the statements of Congressman Waxman, floor manager for the HCQIA. Mr. Waxman explained that the standard for measuring rebuttal of a § 11112(a) presumption was changed from "clear and convincing" to "preponderance of the evidence" because the clear and convincing standard might be "too complex in the minds of the juries." 132 Cong. Rec. at H11590 (Daily ed. Oct. 17, 1986). This language demonstrates that Congress intended juries to be the proper fact finders in determining issues of protection under the HCQIA, something that would be impossible if the protection was only immunity from suit, to be decided solely by the court.

Petitioners' citations supporting their view of the congressional intent are incomplete and misleading. As pointed out, they cite two committee comments made during debate which were later disregarded and deleted. Had they produced the entire quotation from the report they cite on page 11 of their brief, this Court would have been aware of the following crucial legislative history:

> Thus, there is a clear need to do something to provide protection for doctors engaging in peer review if this reporting system is to be workable. To that end, the bill provides limited, but essential, immunity. Doctors and hospitals who have acted in accordance with the reasonable belief, due process, and other requirements of the bill are protected from *damages* sought by a disciplined doctor. The bill protects innocent and often helpless consumers from abuses by bad doctors without insulating *improper anticompetitive behavior* from redress.

H.R. Rep. No. 99-903, 99th Cong., 2d Sess. 3, *reprinted in* 1986 U.S. Code Cong. & Admin. News 6385 (emphasis added).

This language leaves no doubt that the House of Representatives intended that the bill protect doctors from *damages* and not from suit. The Sixth and Tenth Circuit Courts of Appeals fully support this congressional intent in *Manion* and *Decker*. *Accord, Islami v. Covenant Medical Center, Inc.*, 1992 WL 480983 (N.D. Iowa) at 17 (immunity provided in HCQIA is limited immunity from liability *in actions for damages only*). (emphasis added)

As correctly analyzed by the Sixth Circuit, a statutory grant of immunity or protection from suit must be explicit. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794, 800-01. The Sixth Circuit in *Manion*, and the *Decker* court as well, understood that far from being an explicit grant of immunity from suit, the plain text and congressional intent is that the HCQIA provide only protection from damages. As such, the Sixth Circuit properly dismissed the petitioners' appeal for lack of a final

appealable order in accord with the Tenth Circuit in *Decker*.

III. THE DISTRICT COURT'S DENIAL OF SUMMARY JUDGMENT BASED ON THE LIMITED IMMUNITY OF THE HCQIA IS NOT IMMEDIATELY APPEALABLE.

The federal courts of appeals are vested with the power to review final decisions of the district courts. *See* 28 U.S.C. § 1291. A decision is final only when it ultimately disposes of an action and ends litigation on the merits. *See Catlin v. United States*, 324 U.S. 229, 233 (1945). Generally, denial of summary judgment is not final and appealable because the merits require further resolution at trial. In limited circumstances, appellate review of an interlocutory order is permitted under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 357 U.S. 541 (1949). Under *Cohen*, the order appealed must conclusively determine rights separate from the merits of the underlying claims and must be so important that immediate appellate review is necessary. *Id.* at 546. Denial of public official qualified immunity is one example of the "small class" of cases which are immediately appealable under the *Cohen* doctrine, because the right to avoid suit is lost if the case proceeds to trial. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800 (1981).

Petitioners have submitted throughout these proceedings that the HCQIA confers public official immunity on hospitals and physician peer reviewers. This argument

has repeatedly failed and for good reason. The protections of the HCQIA and public official immunity are fundamentally different. Public official immunity is a creature of the common law, imbued with flexibility to protect officials performing discretionary duties against the uncertainty presented by many unsettled laws.

In contrast, the limited statutory protection of the HCQIA is narrowly tailored to physician peer review. The Act contains an internal conditional framework carefully structured to prevent abuse by peer reviewers who would use it to shield anti-competitive acts. Had congress intended application of the public official immunity in the HCQIA, it could easily have done so. For instance, Congress could have given antitrust protection analogous to the protection it gave local governments in the Local Government Antitrust Act of 1984. *See* Scott, Charity, *Medical Peer Review, Antitrust, and the Effect of Statutory Reform*, 50 Maryland L. Rev. 316, 405 (1991). Despite petitioners' claims, the fact remains that Congress took pains to create an entirely new framework with no reference to public official immunity.

This Court's holding in *Wyatt v. Cole*, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992) directly addresses dismissal of interlocutory appeals for private defendants as opposed to public officials. The *Wyatt* court noted that rationales for according government officials qualified immunity from suit are not applicable to private parties, and stated:

> Accordingly, extending *Harlow* qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs or on whether qualified applicants enter public service. Moreover,

> unlike government officials performing discretionary functions, the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes. In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity.

Wyatt v. Cole, 112 S.Ct. at 1833-34.

Petitioners also suggest that the hospitals and peer reviewers can invoke the collateral order doctrine of *Cohen* and the shield of public official immunity because the law should consider them a state entity or "arm of the state." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf and Eddy, Inc.*, 113 S.Ct. 684, 684, 121 L.Ed.2d 605, 605 (1993). This identical argument, in the context of HCQIA, was expressly rejected in *Patrick v. Burget*, 486 U.S. 94 (1988), which held that peer reviewers are not state actors because their actions are not "actively supervised by the state itself." *Id.* at 101. To constitute state action, the state must have full authority to actually overturn the decisions of reviewing committees, and even judicial review falls short of the necessary "active supervision." *Id.* at 101-02. Under this analysis, petitioners are merely private defendants, rather than state actors or public officials. Petitioners note at page 16 that *Puerto Rico Aqueduct* was decided by this Court after oral argument in *Manion* implying that the *Manion* decision would have been different if *Puerto Rico Aqueduct* could have been argued. In fact, Petitioners do not inform this Court that they supplemented the case to the Sixth Circuit one month *prior* to the written decision in *Manion*.

Petitioners' misunderstanding of public official immunity is also seen in their concern that Dr. Manion did not "allege in the complaint that the adequate notice and hearing standards of Section 11112 (b) of the federal Health Care Quality Improvement Act of 1986, ("the Act" or "HCQIA"), 42 U.S.C. § 11112 (b) were not met." (Petition for Writ of Certiorari at 5). In actions involving the defense of public official immunity, plaintiffs oftentimes allege violations of constitutional rights. In *Mitchell v. Forsyth*, 472 U.S. 511 (1982), plaintiff Forsyth alleged that government official defendants had violated his rights under the fourth amendment and the Omnibus Crime Control and Safe Streets Act. *Id.* at 513. In *Hunter v. Bryant*, 112 S.Ct. 534, 116 L. Ed.2d 589 (1991), cited by petitioners, plaintiff Bryant alleged violations of his rights under the fourth, fifth, sixth and fourteenth amendments.

While petitioners think it significant that Dr. Manion did not allege violations of the HCQIA in his complaint, it is really meaningless. Petitioners' concern illustrates their mistaken belief that if petitioners were similar to government officials, then legal actions against petitioners would allege some HCQIA deprivation of "constitutional and statutory rights." In fact, the HCQIA "creates no cause of action for benefit of physicians to enforce its provisions." *Goldsmith v. Harding Hosp., Inc.*, 762 F. Supp. 187, 190 (S.D. Ohio 1991). The HCQIA "was not intended to . . . provide a disciplined physician with a private cause of action." *Caine v. Hardy*, 715 F. Supp. 166, 170 (S.D. Miss. 1989). Thus, there would be no reason for Dr. Manion to allege violations of the HCQIA in his complaint since there is no cause of action for such a

claim. In practice, the HCQIA is an elective defense which could not even be raised until after a complaint is filed. Allegations of failure to comply with the HCQIA in a complaint, thought to be so significant by petitioners, would result in dismissal of such complaint for failure to state a claim.

Petitioners, in citing *Hunter*, are asking this Court to hold them in the same esteem as those government officials who protect the life of the president by conferring on them *Harlow* qualified immunity. However, it is simply not congressional intent to extend such immunity to potential peer reviewers like those in *Patrick*. *See Patrick v. Burget*, 486 U.S. 94, 98 n.3 (1988) (conduct of peer review committee described as "shabby, unprincipled and unprofessional" by lower Court of Appeals, 800 F.2d 1498, 1509 (9th Cir. 1986)).

Public policy does not support petitioners' assertion that they be given special governmental public official immunity for peer review activities. "Both doctors and their patients can suffer if otherwise qualified doctors are wrongly denied staff privileges. . . . Thus, while sharing the interest of hospitals that only qualified doctors be given staff privileges, the public also has an interest in assuring that staff decisions are not made arbitrarily." *See Balkisson v. Capitol Hill Hosp.*, 558 A.2d 304, 308 (D.C. App. 1989). *See also, Rosenblit v. Superior Court*, 282 Cal. Rptr. 819, 827 (Cal. App. 4 Dist. 1991) (unfair treatment and denial of due process in physician peer review described as charade which did not serve public interest).

Petitioners' concern for judicial economy and increasing numbers of antitrust trials as a result of the *Manion*

decision is contradicted by the Sixth Circuit which noted "the strong policy against piecemeal appeals" as a basis for its decision. *Manion v. Evans*, 986 F.2d 1036, 1042 (6th Cir. 1993). In fact, under petitioner's argument, the possibility of an interlocutory appeal first on denial of a motion to dismiss followed then by a second interlocutory appeal on denial of a motion for summary judgment will result in a deluge of appeals.

Finally, petitioner's concern that antitrust cases will inhibit peer review is not supported by legal scholars. "Staff privilege antitrust cases rarely reach trial, much less a judgment for plaintiff. They have not been a successful refuge for disciplined physicians." *See* Miles, John J., *Health Care and Antitrust Law: Principles and Practice*, 7-62 (1993). Petitioners' concern of a "chilling effect" on peer review is remarkably similiar to a chilling effect argument unanimously rejected by this Court addressing peer review confidentiality in academia. *See University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182 (1990).

Clearly, petitioners are not a state entity or arm of the state under any test. Instead, they are simply private entities and private individuals directing their own operative decisions and acting towards their own private purposes. On occasion, these private entities and individuals may engage in anti-competitive activities such as bad faith peer review. Petitioners are private defendants, not public officials, and while they are fortunate to enjoy limited protections under the HCQIA, they cannot stretch this protection beyond congressional intent and receive public official immunity. As the *Patrick* court wisely noted, "If physicians believe that the Act [HCQIA] provides insufficient immunity to protect the peer review

process fully, they must take that matter up with Congress." *Patrick*, 486 U.S. at 105-06, n.8.

CONCLUSION

The petition for writ of certiorari should be denied because both the Sixth Circuit in the present action and the Tenth Circuit in *Decker v. IHC Hospitals, Inc.*, 982 F.2d 433 (10th Cir. 1992) have held without dissent that the district courts' decisions denying defendants' motions for dismissal or summary judgment are not appealable final orders.

The petition should be denied because the dictum from *Summit Health v. Pinhas*, 111 S.Ct. 1842 (1991) is not in conflict with *Manion*. The Sixth Circuit's holding comports with congressional intent to specifically reject earlier versions of the HCQIA's "very broad protection from suit" for a more restricted protection from "liability for damages" because of antitrust concerns. *See Manion* at 1041. Moreover, the Sixth Circuit's decision, which dealt with completely different facts and legal issues, cannot be said to be in conflict with *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992).

The petition should be denied as the court's denial of a motion for summary judgment based on HCQIA immunity is not immediately appealable under the collateral order doctrine. Petitioners are not government officials who fall within the very limited class of interlocutory appeals permitted by the *Mitchell* and *Cohen* decisions.

Finally, the petition should be denied as judicial economy weighs against the creation of innumerable piecemeal appeals. Public policy mandates denial to afford some protection to competent physicians whose patients also suffer the effects of anti-competitive, bad faith peer review. Such anti-competitive activities, repeated every day, exacerbate health care costs and harm competition and society even more than such activities harm the individual physician. In this new age of health care reform, monopolistic hospitals and their disgruntled administrators, using malicious peer review to protect and further their own private financial interests, have neither earned nor deserve special public official qualified immunity.

Respectfully submitted,

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